(21)

Office - Supreme Court, U. S.
FILED
JUL 11 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE,

Petitioner,

vs.

MOSE E. DAVIS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

M. F. TRADER,
S. S. LAMBETH, JR.,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Final judgment and opinion below—Order extending time	2, 3
I. Summary and short statement of the matter involved	3
II. Basis for contention of this Court's jurisdiction to review the judgment	7
III. The questions presented	7
IV. Reasons relied on for allowance of writ	8
Prayer for writ	9
Brief in support of petition for writ of certiorari and references to opinions of Circuit Court Appeals on third appeal, on first appeal and on second appeal	11
Statement of the case	14
Plaintiff and his witnesses	15
How far could these witnesses see—(What plaintiff's surveyor witnesses say)	18
Twenty-four laborers cleaning up obstructions to vision on day of accident	21
Mr. Adrian Overstreet forgets—Plaintiff proves by his witnesses that his contentions are incredible	25
No credible evidence of excessive speed by Sprinkle	29
Plaintiff proves he had to walk only 10 feet to safety while Sprinkle's car ran more than 670 feet	32
Numerous contradictions fatal to plaintiff's case.	35
Brother of plaintiff and number of others in his truck not called as witnesses	40
The unanswered question in this case	41
Specification of assigned errors to be urged	43
Argument	44
The Circuit Court of Appeals errs as to law	44

Page

The facts on third trial present entirely new case 46
A jury's verdict is not sacrosanct—Virginia cases cited 48
Presumption of law in Virginia against party failing to call witness 51
Petitioner's evidence as defendant in trial court 53

TABLE OF VIRGINIA CASES CITED.

Altavista Cotton Mills v. *Lane*, 133 Va. 1, 112 S. E. 637 51
Appalachian Power Company v. *Wilson*, 142 Va. 468, 129 S. E. 277 52
Burch v. *Grace Bldg. Corporation*, 168 Va. 329, 191 S. E. 672 55
Draper v. *Commonwealth*, 132 Va. 648, 111 S. E. 471 52
Harris v. *Howerton*, 169 Va. 659, 194 S. E. 696 50
Harrell v. *Virginia Electric & Power Co.*, 12 S. E. (2d) 833 50
Massie v. *Firmstone*, 134 Va. 450, 114 S. E. 632 ..... 49, 50
Norfolk and Western Ry. Co. v. *Crowe's Admx.*, 110 Va. 798, 67 S. E. 518 49
Norfolk and Western Ry. Co. v. *Strickler*, 118 Va. 153, 86 S. E. 824 48
South Hill Motor Co. v. *Gordon*, 172 Va. 193, 200 S. E. 644 48
Sprinkle v. *Davis*, 104 F. (2d) 487 ..... 2, 12
Sprinkle v. *Davis*, 111 F. (2d) 925 ..... 2, 13
Thalhimer Bros. v. *Casci*, 160 Va. 439, 168 S. E. 433 50

STATUTE CITED.

Code of Virginia, Sec. 2154 (126) (d) 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE,

Petitioner,

vs.

MOSE E. DAVIS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ralph Elliott Sprinkle, a resident of the city of New York, in the State of New York, respectfully shows that he is aggrieved by a final judgment of the Honorable United States Circuit Court of Appeals for the Fourth Circuit, entered February 17, 1941.

Petitioner deems it proper to state that this case has been tried three times in the District Court of the United States for the Western District of Virginia, and that twice the judgment of said United States District Court has been reversed upon grounds which are set forth in copies of the

opinions of said United States Circuit Court of Appeals, filed herewith, and which will be considered in petitioner's supporting brief herewith filed. *Sprinkle* v. *Davis*, 104 F. (2d) 487; *Sprinkle* v. *Davis*, 111 F. (2d) 925.

But petitioner asks leave to aver with emphasis that *the evidence at the third trial of this case was distinctly different from the evidence offered at either of the two preceding trials, and so different as to present an entirely new case upon the facts.*

And petitioner deems it proper at the outset, with entire deference for the United States Circuit Court for the Fourth Circuit, to state that, notwithstanding this case has been before said United States Circuit Court of Appeals three times, *no opinion has ever been written by said Court* discussing the evidence or the applicable decisions of the Supreme Court of Appeals of the State of Virginia bearing upon the evidence. On this account petitioner respectfully submits that this Honorable Court must look to this petition, and to petitioner's supporting brief, for petitioner's discussion of the evidence and of the special principles of law in force in the State of Virginia applicable to such evidence.

The final judgment of the United States Circuit Court of Appeals for the Fourth Circuit, above referred to, is found in the Record at p. 60, Vol. No. 2.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the Honorable District Court appealed from is found in the Record at p. 38, Vol. No. 2.

It seems proper that petitioner should point out that the foregoing is the only opinion ever delivered by the Honorable United States Circuit Court of Appeals for the Fourth Circuit. It seems worthy of note, too, that the printed opinion of said United States Circuit Court, which is filed in the Record, shows that this case was argued in said court

on January 6, 1941, and decided by said court, by a *per curiam* decision on January 6, 1941.

The judgment of the District Court of the United States for the Western District of Virginia, which was affirmed by the opinion of the said Circuit Court of Appeals, was entered by said District Court on the 11th day of July, 1940, whereby the verdict of the jury in the sum of $8,500.00, with interest thereon, at the rate of 6% per annum from the 28th day of June, 1940, until paid, together with costs, was affirmed (R. 2, Vol. 1).

Petitioner further shows that by an order signed by the Chief Justice of the United States, dated May 12, 1941 (R. 63, Vol. 2), an extension of sixty days was granted within which to file a petition for certiorari:

I.

Summary and Short Statement of the Matter Involved.

The meat of this case may be presented in the form of a single question:

IS IT POSSIBLE FOR A CAR, WHICH, ON A CLEAR SUMMER AFTERNOON, *IS NOT IN SIGHT 670 FEET AWAY* ON A HIGHWAY OF UNOBSTRUCTED VISIBILITY, TO HIT A PEDESTRIAN WHO SAYS THAT, STANDING ON THE EDGE OF THE MACADAM ROAD, HE FIRST LOOKED CAREFULLY IN THE DIRECTION FROM WHICH THE CAR WAS APPROACHING, THAT HE THEN LOOKED IN THE OTHER DIRECTION, AND SAW NO CAR, THAT HE THEN STARTED ACROSS, AND WAS STRUCK BY THIS CAR UNSEEN AT 670 FEET AWAY BEFORE HE COULD GO STRAIGHT ACROSS A HIGHWAY ONLY 20 FEET WIDE?

There are collateral issues and important sidelights of fact, which will be considered in petitioner's supporting

brief. But the fundamental issue is wrapped in the above question. Petitioner will not vary the facts one iota. Petitioner in his supporting brief quotes literally the very words of the plaintiff in the trial court, and the very words of three other witnesses for plaintiff to like effect. And, further, in his supporting brief, he quotes the very words of plaintiff's two expert witnesses, both certified engineers, from whose testimony the plaintiff's account of the accident is shown to be incredible and impossible.

On July 2, 1937, at about four o'clock in the afternoon, Mose E. Davis, a laborer in a force of about twenty-four men, who had been working on the shoulders of a public highway, cleaning up vegetation and so forth a few miles west of the city of Lynchburg, Virginia, was struck by a car driven from Lynchburg in a westerly direction by Ralph E. Sprinkle, the defendant, now petitioner, who was on his way to meet an engagement for dinner with some friends whose residence was a few miles west of the scene of the accident.

Davis, along with his fellow-laborers, had quit work a few hundred yards east of the place of the accident. They loaded their tools in two trucks and proceeded in these trucks westerly several hundred yards to the Candler residence, which is on the southern side of the highway, where some more tools were to be loaded on the trucks.

The trucks, according to plaintiff's evidence, were both parked on the northern shoulder of the highway, entirely off the hard surface, and with a space of from 6 to 10 feet between them, according to the testimony of plaintiff's witnesses (Milton, R. 60, Vol. 1 and Dillon, R. 76, Vol. 1). Davis rode in the rear truck. He testified that he had left his lunch bucket across the highway opposite the rear end of the parked truck in which he had been riding, that he got out of the truck by stepping on a wheel on its north side, that is, away from the traveled portion of the high-

way; that he walked around the rear of this truck, intending to cross the highway in order to get his lunch bucket, that as he stood on the edge of the macadam, or hard surface, he looked carefully easterly, in the direction from which Sprinkle's car was coming, that no car was in sight, that he then looked westerly and saw no car, whereupon he started to walk straight across the 20-foot road, and that when he had reached a point about a step or a half step from the southern edge of this macadam road, he was struck by Sprinkle's car.

Three witnesses testified to like effect, namely, that they looked down this road easterly just as Davis was about to cross, and that no car was in sight. One of these witnesses, Shelton, looked from the road elevation, but two others, Edward Carter and Thomas Carter, brothers, who were riding in this same truck with Davis, were still in the truck when Davis started across, looked easterly from the elevation of the truck body, which, as has been noted, was parked entirely on the northern shoulder of the highway. Hence, the Carter brothers, it is contended, would have a considerably longer range of visibility than either Davis or Shelton had, seeing that the Carter brothers were looking easterly from the northern shoulder of the road, toward a curve to the south, on which account the position and the elevation of the truck would afford them substantially longer range of visibility.

But both of the Carter brothers say no car was in sight as Davis started across this 20-foot road.

The plaintiff, Davis, called as witnesses two certified civil engineers, Malcolm and Overstreet, who testified that they had tested the range of visibility, of sight clearance, as they termed it, looking easterly from the point where Davis claims to have started across, and that this distance of sight clearance was 670 feet.

Petitioner further, in his supporting brief, quotes the testimony of two of plaintiff's witnesses, one, Milton, who says that the skid marks made by Sprinkle's car when the brakes were applied, started opposite a little hickory tree and continued westerly in Sprinkle's right lane for from 50 to 60 feet before they, the skid marks, crossed the center line of the highway; and Overstreet, the other witness, a civil engineer, says that this little hickory tree is 39 feet east of the rear end of the truck, the point where Davis entered the highway.

The significance of this testimony of Milton and Overstreet, both witnesses for plaintiff, is that Davis entered the highway at a point from 10 to 20 feet *east* of the point where Sprinkle's car crossed the center line of the highway, that therefore Sprinkle's car was in its right lane when Davis started across, and that, *therefore, Davis had to walk, not 20 feet, but only 10 feet of this 20-foot road, in order to get out of the path of a car not in sight at 670 feet easterly when Davis started across.*

> THEREFORE, THE PLAINTIFF'S OWN EVIDENCE PRESENTS THIS SINGLE QUESTION: IS IT POSSIBLE FOR A CAR NOT IN SIGHT AT 670 FEET TO STRIKE A PEDESTRIAN WHO HAS TO WALK ONLY 10 FEET IN ORDER TO GET OUT OF THE PATH OF THE CAR WHICH MUST TRAVEL MORE THAN 670 FEET IN ORDER TO STRIKE HIM?

Appropriate references to the record are made in the supporting brief to sustain the foregoing recitals.

Petitioner also presents a number of other relevant and convincing facts, the recital of which here would unduly prolong this summary. There are also in the record original exhibits, maps and photographs, which will make realistic the foregoing recitals.

II.

The basis upon which it is contended that this Court has jurisdiction to review the judgment in question.

Reference is here made to the Act of February 13, 1925, Chapter 229, 43 Stat. 936, and in particular to Section 240 (a), of the Judicial Code, as amended, which may be found on page 5 of the Appendix to the Rules of this Honorable Court.

III.

The Questions Presented.

The assignment of numerous errors will be found in the record, particularly under the caption "Statement of Points Upon Which Appellant Will Rely on Appeal" (R. 17, Vol. 1).

The errors thus assigned are believed to be substantial. But all of the errors so assigned, petitioner, upon reflection, believes to be wrapped in the single contention that under his own evidence plaintiff has no case against the defendant below, supplemented by his further contention that plaintiff's evidence not only does not prove his case, but that the testimony of the plaintiff below, and of his chief witnesses, is shown to be false by the contradictions hereinafter pointed out. Therefore, petitioner feels that the following specifications of errors are sufficient:

(a) The error of the Circuit Court of Appeals in affirming the action of the trial court in overruling defendant's motion to strike plaintiff's evidence and to direct a verdict for defendant, which motion was made at the conclusion of plaintiff's case in chief.

(b) The error of the said Circuit Court of Appeals in affirming the action of the trial court in overruling defendant's motion to strike plaintiff's evidence and to direct a verdict for the plaintiff, again made, pursu-

ant to the local state practice, at the conclusion of all of the testimony of both plaintiff and defendant.

(c) The error of the Circuit Court of Appeals in affirming the action of the Trial Court in overruling defendant's motion to set aside the verdict of the jury and to enter judgment for the defendant pursuant to Section 6251 of the Code of Virginia.

(d) The error of the said Circuit Court of Appeals in affirming the judgment of the trial court on the ground that the jury's verdict in favor of plaintiff could not be disturbed.

The development of the basic errors thus assigned will be found in Section III and Section V of the supporting brief.

IV.

The Reasons Relied On for the Allowance of the Writ.

(a) Petitioner respectfully submits that the judgment of the aforesaid District Court and the judgment of the aforesaid United States Circuit Court of Appeals are so clearly against the evidence, even the plaintiff's own evidence, as to render mandatory the exercise of this Court's superior jurisdiction in order to prevent manifest injustice.

(b) The Circuit Court of Appeals has decided an important question of local law in a way which is directly in conflict with the applicable decisions of the Supreme Court of Appeals of Virginia.

(c) The Circuit Court of Appeals has in effect, though not in intent, so far departed from the accepted and usual course of judicial proceedings as to call for an extension of this Court's power of supervision.

The reasons assigned under this caption will be elaborated in petitioner's supporting brief.

WHEREFORE, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause, directed to the Honorable United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and transmit to this Honorable Court, in manner and form as provided by law, a complete transcript of the record and all proceedings had in said Circuit Court of Appeals in this cause, to the end that this cause may be reviewed and determined by this Honorable Court, and that petitioner may be granted such other and further relief as his case may entitle him to, or as to equity shall seem meet.

And petitioner will ever pray.

M. F. TRADER,
Lynchburg, Virginia,
S. S. LAMBETH, JR.,
Bedford, Virginia,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE,

Petitioner,

vs.

MOSE E. DAVIS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Reference to Official Report of Opinions Delivered in the Courts Below.

The District Court of the United States for the Western District of Virginia delivered no opinion in rendering judgment affirming the verdict of the jury against the defendant below, now petitioner, for certiorari.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the aforesaid District Court, is set forth in full in the Record, p. 38, Vol. 2.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit on the first appeal will be found in 104 F. (2d) 487.

The opinion of said last named court on the second appeal will be found in 111 F. (2) 925.

As has been indicated, the judgment of the District Court was reversed on both the first and second appeals.

On the first appeal, the judgment against the defendant was reversed because of error in the refusal of the District Court to instruct the jury that under Section 2154 (126) (d) of the Virginia Code, pedestrians are required to cross highways at right angles, and are forbidden to cross them diagonally. We quote from the opinion of the learned Circuit Court of Appeals in the case of *Sprinkle* v. *Davis*, 104 F. (2d) 489:

> "But we are of opinion that the defendant was prejudiced by the refusal of the court, when requested, to instruct the jury that under section 2154 (126) (d) of the Virginia Code pedestrians are required to cross highways at right angles, and are forbidden to cross them diagonally. Section 2154 (126) (d) provides:
>
> 'Pedestrians shall cross only at right angles, and shall not cross highways diagonally; nor, except to board a street car, or to enter a safety zone at right angles, shall they step into that portion of the highway open to moving traffic, at any point between intersections where their presence would be obscured from the vision of approaching drivers by a vehicle or other obstruction at the curb or side.' "

We quote, further, from page 488:

> "Davis, desiring to get his dinner pail that he had left on the south side of the road opposite the cab of the second truck, alighted therefrom on the north side of the road upon the shoulder, went around the rear end of the truck, and walked slowly across the road

diagonally (italics supplied) in a general southwesterly direction.''

It is important to note that the Circuit Court of Appeals aforesaid found in its first opinion delivered in this case that Davis walked ''slowly'' and ''diagonally'' across the road because, as we shall see that among the many contradictions on the part of plaintiff and his witnesses in the third and last trial of this case, Davis testified that he walked at an ordinary gait, not slowly, and one of his witnesses, Shelton, testified that when Davis reached about the center of the road he ''peartened up'' in his walk.

We shall also find when we come to quote the testimony of Davis, and some of the more important witnesses, that he walked, not diagonally across the road, but that he walked straight across, practically at right angles, having stated, as we shall see, that his lunch bucket was opposite the rear of the truck in which he was riding, and that he went straight across to get his lunch bucket.

On the second appeal, as will appear by a perusal of the court's opinion (*Sprinkle* v. *Davis*, 111 F. (2d) 925), the trial court was reversed because of repeated improper remarks and intrusions and conduct during the progress of the trial.

The Circuit Court of Appeals, with characteristic restraint, makes adverse comment upon some of the episodes which marked the conduct of the District Judge at the second trial.

The judicial restraint of the Circuit Court of Appeals, which restraint it is not intended to criticize, does not adequately reflect what occurred at the second trial, and therefore does not adequately reflect the handicap under which the defendant labored, nor the impossibility to expect a verdict under the conditions which prevailed.

Petitioner refers to the first and second trials of this case and to the atmosphere which prevailed by reason of

the judicial attitude in explanation of the fact that it was practically impossible to obtain a verdict from a jury when the course of the trial was punctuated by personal and offensive attacks and reflections upon counsel for the defendant, as prejudicial as they were unjustified. And, aside from the errors complained of at the third trial, it is not an unreasonable implication that the jury which heard the case on the third trial was necessarily influenced by the fact that at the two prior trials other juries had rendered verdicts against the defendant.

Statement of the Case.

In order to avoid repetition, petitioner likewise asks leave to refer to the summary and short statement of the matter involved, under Section I of the petition for certiorari, where a statement of the case will be found, with appropriate references to the record.

As has been repeatedly stated in the petition for certiorari, petitioner's contention is that it is incredible that the plaintiff below could have failed to cross a 20-foot road, walking at an ordinary gait, without being struck by a car which when plaintiff started straight across this 20-foot road from the edge of the macadam, or hard surface, was not in sight at a distance of 670 feet easterly.

Petitioner will show that at no conceivable speed, certainly at no speed sustained by plaintiff's evidence, could Sprinkle's car have reached Davis as he walked across this road from a point more than 670 feet away, that plaintiff's contention is mathematically impossible.

Aside from the contention, which rests in the evidence soon to be considered, the contention of the plaintiff below would appear to be inherently incredible without evidence. The court will judicially know that as one walks there is a rhythmic swing of the motion of the body and of the head; that the eyes will sweep the range of visibility, for no in-

considerable distance, both to the right and to the left, and that therefore Davis must have seen this approaching car if he walked straight across this road, or practically so, as he said he did.

Then there is the notice of an approaching car and the greater the speed, the greater the noise. Thus it may be observed that entirely apart from evidence, the eye and the ear of this man were on the outposts, so to speak, and that it would have been practically impossible for a man possessed of normal faculties, to have been run down by a car under the facts recited in the record of this case.

But petitioner throws these considerations aside, for the moment. Petitioner rests his case of incredibility upon the affirmative testimony of the plaintiff and his witnesses. For the convenience of this Honorable Court, petitioner asks leave to quote liberally from the testimony of the

Plaintiff and His Witnesses.

But, first, that the reference of the witnesses to the "trucks" may be understood, it should be stated that Mose Davis, the plaintiff, had been working along the highway that day, along with some twenty-odd other men. Having finished the day's work, these laborers stopped at the place of the accident in order to pick up some tools and in order that some of the men, Mose Davis, the plaintiff, one of them, might get their lunch buckets, which they had left hanging on trees on the side of the road. The men were in two trucks. Mose Davis rode in the rear truck, that is, in the truck nearest the direction from which Sprinkle's car approached, an easterly direction from the point of the accident, toward the city of Lynchburg, Virginia. In the truck with Mose Davis were, among others, Edward Carter and Thomas Carter, brothers. All of plaintiff's testimony is to the effect that both of these trucks were parked entirely off the hard surface when they stopped at the point of the

accident. We now quote from the testimony of the plaintiff's witnesses:

(a) Mose E. Davis, plaintiff (R. 157, Vol. 1):

"I come on around the truck, and just time I got to the back of the truck Edward Carter told me to bring his bucket, and I told him all right. And then when I got around to the edge of the road I looked down the road, down toward Lynchburg. I didn't see nothing coming. I didn't see nothing coming and then I looked up the road and wasn't nothing coming neither way, and I started on across, and just the time I got just about a step, a half step back off of the hard surface—you know a step before I got off the hard surface—this car come up and struck me."

Cross-examination:

"Q. How did you walk across that road, Mose; did you walk fast or slow?"

"A. I can't remember how I was walking. I imagine I was walking like I always walk."

"Q. Did you walk at an ordinary walk?"

"A. Yes, sir."

* * * * * * *

R. 166, Vol. 1.

"Q. Did you stop on your way across the road?"

"A. No, sir, I didn't stop until the car hit me."

(b) Edward Carter, for plaintiff—R. 134, Vol. 1.

"Q. Now just tell the jury what you saw from the time he (Mose Davis) got out of the truck. Go on and tell what you saw."

"A. Well, he got down from the truck over the wheel, and I told him to get my bucket, and he came around the truck, and I seen him look down the road and he started across the road and the car hit him."

"Q. When you saw Mose look down the road you were facing east weren't you?"

"A. Yes, sir."

"Q. That would be towards Lynchburg?"
"A. I was sitting facing south, but I was looking at him as he came around."
"Q. Now, as you looked at him when you came around there, did you testify you saw Mose look?"
"A. Yes, sir."
"Q. Did you see any car coming at that time?"
"A. No, sir, I didn't see any coming."

(c) Thomas Carter, for plaintiff—R. 150, Vol. 1.

"Q. All right, go ahead and tell the jury just what you know about this accident, what you saw or heard."
"A. I was sitting in the body of the truck, and I got up and looked down the road. I didn't see any vehicle or anything approaching. Mose Davis and my brother were in the truck, and some more boys, I don't know exactly who, and Mose got out and started behind the truck, and I started getting off the truck and I heard the crash and I looked and Mose was in the air."

(d) F. T. Shelton, for plaintiff (R. 86, Vol. 1):

Direct examination:

"Q. What were you doing, Mr. Shelton?"
"A. I had my team down there grading the banks ahead of the other workers."

Again, R. —:

"Q. Did you see when he started across the road?"
"A. Yes, sir."
"Q. Did you know who it was?"
"A. Not at that time I didn't."
"Q. Did you later find out who it was?"
"A. Yes, sir."
"Q. Who was it?"
"A. Mose Davis."
"Q. Now, how far out in the road was he when you first saw him?"
"A. Well, I imagine just a few steps out in the road when he started across."

"Q. How was he going across the road?"
"A. He was walking when I saw him."

Again, on cross-examination, R. 90, Vol. 1:

"Q. Did he continue to walk at the same rate of speed all the way across?"
"A. Well, he might have peartened up his walk a little, Mr. Trader, when he got to about the center of the road."

And, again, R. 92, Vol. 1:

"Q. When you looked down the road, Mr. Shelton, and you saw Mose either when he first started across the road or when he was two to five feet out in the road which of those statements is correct? You say you didn't see any car coming at that time?"
"A. No, sir."
"Q. Wasn't any car in sight?"
"A. I didn't see any."
"Q. How far could you see down the road?"
"A. I wouldn't say. I could see a considerable distance down the road."

Thus Plaintiff and Three of His Witnesses Say That No Car Was in Sight When Davis Started Across This 20-Foot Macadam Road.

How Far Could These Witnesses See?

The important, the decisive question, is: How far could these four witnesses see easterly, in the direction from which Sprinkle's car approached, at the moment when Davis started across this 20-foot macadam road?

Plaintiff offered in evidence a map made by his witness, C. B. Malcolm, a certified engineer, from which it will appear that the point from which plaintiff entered the road is designated point "B", and that the point of maximum sight clearance easterly, where Overstreet stood, another engineer who testified for plaintiff, is designated point "A".

Let us now hear the testimony of plaintiff's engineers as to the distance of visibility which Davis, the plaintiff, had, in the direction from which Sprinkle's car was approaching.

(a) C. B. Malcolm (R. 40, Vol. 1):

"By the Court:

"Q. From what point did you make your test?"

"A. Judge, when we got to the grounds this gentleman told me that the back end of a truck where the accident occurred was 78 feet east of that mail box. We took a steel tape and measured down 78 feet and made a mark, a yellow mark, on the macadam approximately two feet on the macadam. That is indicated at point "B" station "6 plus 62."

"Q. Do I understand your tests were made from that point?"

"A. That point and the extreme point east of same."

"By the Court: Objection overruled."

"A. (continuing) Mr. Adrian Overstreet, the gentleman sitting in the court room, walked down the road at my request."

"By Mr. Hickson:

"Q. You were standing here at "B"?

"A. Yes, sir, and Mr. Overstreet walked east down the road just as far as I could see him and he stopped at a point where if he had walked any further east I couldn't see him, which is shown on the map at a point eight feet east of the initial beginning point, which means that the maximum sight clearance is 662 feet plus 8 feet, or 670 feet."

"Q. How have you identified this point on the map at which you would have lost sight of Mr. Overstreet had he gone any further?"

"A. By point "A," which is approximately 2 feet north of the center line of the macadam at a point at which a man would normally be in the macadam driving a car."

"By the Court:

"Q. What were you doing?"

"A. I stood on "B" and watched Mr. Overstreet walk east down the road and he stopped at the maximum point that I could see him."

"Q. And you stood in the road at point "B"?

"A. Yes, sir."

"Q. How tall are you?"

"A. Five foot, eleven and a quarter, I think."

"Q. All right, go ahead."

"A. I then took a picture of Mr. Overstreet standing on point "A" from point "B".

(b) Adrian Overstreet, for plaintiff (R. 57, Vol. 1).

"Q. When you made these tests with Mr. Malcolm you were down here holding up a handkerchief. You were in the middle of the road?"

"A. No, sir, two feet north of the center."

"Q. You did not have any difficulty in seeing him down there, did you?"

"A. I could see his shoulders and arms."

"Q. You could see his shoulders and arms at 670 feet?"

"A. At 670 feet."

Petitioner would not withhold from the Court the fact that this witness, Overstreet, stated that when these tests of visibility were made by Malcolm and himself, that is, on June 14, 1940, visibility was to some extent obstructed by grass growing on the inside (on the south side) of the road (Sprinkle's line of travel was on the north side of this road)—a condition which does not seem to have disturbed Mr. Malcolm's vision.

It will be borne in mind, however, that while the tests were made on June 14, 1940, this accident occurred on July 2, 1937, three years prior to the date of the tests. The following testimony of the witness is important: (R. 56, Vol. 1).

"Q. Mr. Overstreet, assuming that the vegetation was there when you and Mr. Malcolm made your observations on June 14, you don't know whether as a matter of fact that vegetation was there at the time Mose Davis was injured in 1937?"

"A. I do not know."

At the date of the accident twenty-four laborers had been working all day at and near the scene of the accident clearing away vegetation.

(a) ALBERT J. AKERS, for plaintiff (R. 94, Vol. 1):

"Q. I mean were you in charge of the work?"

"A. I was in charge of the work as foreman."

"Q. You were doing landscape work. Now, approximately how many men were employed on that job that day, the 2nd day of July, 1937?"

"A. About twenty-four."

"Q. Where had you been working on the morning of that day and during the day up until quitting time?"

"A. I had been working on that bank in front of Mrs. Candler's home."

"Q. What time did you go to work that Morning, Mr. Akers?"

"A. 7:30."

"Q. And what time did you quit that day?"

"A. 4:00 o'clock."

"Q. And at the time you quit where were you and your men at work?"

"A. I had about fifteen men this side of Mr. Candler's home about 400 yards and I left about nine men on the bank at Mrs. Candler's home dressing it up."

Petitioner would point out that the said Akers was testifying in the courtroom of the United States District Court at Lynchburg, so that when he said he had fifteen men "this side of Mr. Candler's home about 400 yards" he evidently meant that the men were working 400 yards easterly from the point of the accident, which occurred at Candler's home, and toward Lynchburg. In other words, Akers says that

he had fifteen men working on the shoulders and sides of the road on the day of the accident, at practically the same point where Overstreet says the grass was obstructing vision three year later.

(b) F. T. SHELTON, for plaintiff (R. 86, Vol. 1):

"Q. What were you doing, Mr. Shelton?"
"A. I had my team down there grading the banks ahead of the other workers."

(c) J. W. OVERSTREET, for plaintiff (R. 125, Vol. 1):

"Q. Where were you working before the accident happened, east or west of there?
"A. East of the Candler home."

* * * * * * *

(R. 125, Vol. 1):

"Q. And after you loaded your men and tools down near the Hawkins home and started on up the road, will you tell the jury whether or not Mose Davis was in either truck?"
"A. Yes, sir."

Petitioner will point out that here counsel for the plaintiff assumes that the laborers were "down near the Hawkins home" at quitting time on the afternoon of the day of the accident. The Malcolm plat will show that the Hawkins home was on the inside of the curve on the bank on which the grass was growing which Overstreet said obstructed vision on *June 14, 1940.*

In other words, the force of men was at work at the very spot on July 2, 1937, cleaning up the grass and other vegetation, so that there could not possibly have been any obstruction of vision from this cause on the day of the accident.

(d) Edward Carter, for plaintiff (R. 133, Vol. 1):

"Q. Were you working for the State Highway Department in July, 1937?"

"A. Yes, sir."

"Q. What kind of work were you doing, Edward?"

"A. We was just straightening the road up and digging out the ditches."

"Q. Were you working as a laborer on the road force?"

"A. Yes, sir."

"Q. Who was your boss?"

"A. Mr. Akers."

* * * * * * *

(R. 133, Vol. 1):

"Q. What did you do when four o'clock came?"

"A. Well, when four o'clock came we got our tools and started up the road where some other men were at to pick the other men up and get our lunch pails and some other tools we had up there."

(e) Thomas Carter, for plaintiff (R. 149, Vol. 1):

"Q. What kind of work were you doing and where were you working that day?"

"A. I was working between 500 and 800 yards below the Candler home, east of Forest."

"Q. Were you working as a laborer on the road force?"

"A. Yes, sir, as a laborer."

"Q. Who was your foreman?"

"A. Mr. Akers."

"Q. What time did you finish work that day?"

"A. Four o'clock, I think."

"Q. Where were you when you finished work at four o'clock?"

"A. About 800 yards east of the Candler home."

Petitioner would again emphasize the fact that this witness for plaintiff states that he finished work about 800

yards east of the Candler home. This was slightly beyond the point of maximum visibility. Evidently this group of laborers had been working easterly and had passed over the very terrain or side of the road, cleaning up as they went, to which the witness, Overstreet, referred when he stated that in 1940 grass was growing which obstructed vision to an extent.

(f) And finally, Mose E. Davis, plaintiff (R. 156, Vol. 1):

> "Q. Where were you when four o'clock came to finish your day's work?"
>
> "A. We finished the day's work down below Mr. Hawkins' house."
>
> "Q. What did you do then, Mose?"
>
> "A. Well, we brought the tools up and got in the truck and came up next to Mr. Candler's where the other men was with more tools."

We have been at pains to show by the plaintiff himself and by a number of his witnesses that there were twenty-four men working on the very day of the accident on the road sides between the Candler house and easterly beyond the point where Overstreet said the grass obstructed vision in 1940.

Thus we have a demonstration that there could not have been vegetation which obstructed vision on the day when Davis, the plaintiff, was injured. Thus Overstreet's intimation of obstruction of visibility on July 2, 1937, because grass was growing at the point in question in June, 1940, is set at naught *by the men who cut the grass down on the very day of the accident.*

It may be noted, further, that Edward Carter and Thomas Carter looked down this road, as we have seen from their testimony, not from the road level, nor from a point two feet out on the hard surface, as Malcolm and Overstreet looked (R. 41, Vol. 1).

Edward Carter and Thomas Carter looked down the road easterly in the direction from which Sprinkle's car was coming, *and they looked from the elevation of the body of the truck in which they had been riding;* and from which they had not alighted; and they looked *from the northern shoulder of the highway,* where the trucks *were parked off the hard surface,* from which point the range of visibility must of necessity have been much greater than Malcolm's—yet, these Carter boys saw no car approaching when Davis entered the macadam surface of this 20-foot road which he claims he could not cross without being hit by a car *out of sight at 670 feet when he started across.*

And petitioner deems it worthy of repetition to state that when Davis started across this highway, Sprinkle's car was not in sight at a much greater distance than 670 feet, according to the testimony of Edward Carter and Thomas Carter, for they looked from the elevation of a *truck body entirely on the north shoulder of the road,* and they looked toward a curve to the south, thus giving these two young men a far greater range of vision than Malcolm or Overstreet had—and, therefore, a range of vision far in excess, exactly how much in excess we can not say, of the range of visibility of 670 feet which Malcolm and Overstreet testified that they had from the *ground level two feet out on the highway.*

Mr. Adrian Overstreet Forgets.

Recurring to Overstreet's testimony that in June, 1940, visibility was somewhat obstructed by grass growing on the shoulder of the inside curve, petitioner refers to Record p. 53, Vol. No. 1. Here Overstreet testifies that while his office is in the city of Lynchburg, his residence is west of the scene of this accident, that he passed the point twice a day going to and coming from his work in Lynchburg. It would seem, therefore, that Mr. Overstreet was scarcely frank in

seeking to make it appear that grass growing in June, 1940, might have obstructed the vision of Mose Davis in July, 1937.

As Mr. Overstreet was passing the point in question twice a day in July, 1937, why did he not testify as to the actual conditions which he observed at the time of the accident, rather than to refer to conditions which he observed three years later?

PLAINTIFF PROVES MATHEMATICALLY BY HIS OWN WITNESSES THAT HIS EVIDENCE IS FALSE AND THAT HIS CONTENTIONS ARE INCREDIBLE.

It will be recalled that the plaintiff said (R. 165, Vol. 1) that he walked across this road at an ordinary walking gait, and that he did not stop until the car had hit him (R. 166, Vol. 1).

It will be recalled, also, that plaintiff did not walk the full width of the macadam road before he was struck, for he says (R. 157, Vol. 1):

> "Just about the time I got just about a step, a half step back off of the hard surface—you know a step before I got off the hard surface—this car come up and struck me."

Therefore, the plaintiff actually walked, according to his version, about 18 feet of the road width, while Sprinkle's car was covering more than 670 feet.

Petitioner now refers again to the testimony of C. B. MALCOLM, plaintiff's witness (R. 52, Vol. 1):

> "Q. You are a pretty good mathematician and I would like for you to figure the rates of speed, how long it would take in seconds for a car to travel 670 feet at 40 miles an hour."
>
> "A. At 40 miles an hour a car would go 58⅔ feet per second and that would be a little less than 11½ seconds."

"Q. Figure it at 45 miles an hour."
"A. That would be 10 and a fraction seconds."
"Q. At 50 miles an hour."
"A. Nine and a fraction seconds."
"Q. 60 and 65 and I am through."
"A. 60 miles would be a little less than 8 seconds and 65 miles an hour would be a shade over 7 seconds."
"Q. Mr. Malcolm, are you connected with the State Highway Department?"
"A. Not now. I was in 1920."

Again, MALCOLM (R. 49, Vol. 1):

"Q. What is the speed of an average man walking?"
"A. I would say about three miles an hour."
"Q. What would be a slow walk?"
"A. A tall man will walk faster than a short man because his legs are longer."

"By the Court:

"All that is apparent, but let's get a general idea."

"By Mr. Hickson:

"Q. What would a slow man walk at?"
"A. I would say if a man is not in a hurry he would walk about half as fast as a man who was in a hurry, which would be about two miles an hour."
"Q. For what it may be worth, how long would it require a man walking at two miles an hour to cross the road?"
"A. The same rule applies. It would be a little less than 7 seconds."
"Q. And that road at the point 78 feet east of the Candler mail box is hard surfaced for what width?"
"A. 20.7 feet today."

Re-Cross Examination.

"By Mr. Trader:

"Q. How long would it take an average man to go across that road at 3 miles an hour?"

"A. It would be about 4.4 feet per second and divide that into 20. It is a little over 4½ seconds."

"Q. I believe you made a computation as to how long it would take a car to go 670 feet?"

"A. Yes, sir, at several speeds."

"Q. Let's have your figures at 4 miles an hour for a man to walk 20 feet."

"A. It would be about 3½ seconds."

Yet, again, from Malcolm's testimony (Record p. 48, Vol. No. 1):

"By Mr. Hickson:

"Q. Mr. Malcolm, will you tell the jury how many feet per minute an automobile will travel at 65 miles an hour?"

"A. Speed of any moving object is just slightly less than one and-one half times the miles per hour, in feet per second. In other words 30 miles an hour is 44 feet per second, 60 miles will be 88 feet per second."

"Q. 70, what would that be?"

"A. 102⅔ feet per second."

"Q. At 70 miles an hour it would take an automobile how long to proceed the distance from point 'A' to point 'B' along that highway?"

"A. It would be roughly speaking 6½ seconds."

From the above quoted testimony of the witness, Malcolm, it appears that if Sprinkle's car had been driven at 70 miles per hour, it would cover the 670 feet between point "A" and "B" on Malcolm's map in 6½ seconds. It further appears that at an average walking gait of three miles an hour, the plaintiff would have crossed the entire road width in a little over 4½ seconds.

But even at this maximum estimate of 70 miles an hour, two details must be remembered. The first is that Sprinkle's car *was not in sight* at 670 feet, the maximum point of visibility. Consequently, Sprinkle's car traveled more than 670 feet, and therefore even at 70 miles an hour it would

have required more than 6½ seconds to cover the distance. The second detail is that the plaintiff did not walk the full width of the road, but only about 17 or 18 feet of the full width. If he could have crossed the road in 4½ seconds while Sprinkle was driving 670 feet at the rate of 70 miles an hour in 6½ seconds, the plaintiff would have crossed the entire road two seconds before Sprinkle could have reached him. And when we consider that Sprinkle was driving more than 670 feet, and that Davis was walking less than 20 feet, the margin of difference would be that much greater.

Thus, from the evidence of plaintiff and his own witness, Malcolm, it is impossible that Sprinkle could have hit him. And this means that it is impossible that the testimony of the plaintiff could have been true.

No Credible Evidence of Excessive Speed by Sprinkle.

It is true that Louis Dillon, witness for the plaintiff, testified as follows (Record p. 72, Vol. No. 1):

> "Q. Can you tell the jury from what you heard and saw approximately how fast the Sprinkle car was going?"
>
> "A. I would say he was doing at least 60 miles an hour."

But it is also true that Dillon was driving the front truck which at the time of the accident he stated had been parked off the hard surface. As these two trucks were each 18 or 19 feet in length, as there was a space between the two of about 10 feet, and as the plaintiff testified that he entered the roadway from the rear of the rear or easterly truck, it follows that Dillon was about 50 feet west of the point from which the plaintiff entered the highway, sitting in the cab of his truck with the other truck between him and Davis, and with his back turned to Davis, and consequently with his back turned to Sprinkle's car.

Reference is made to Dillon's testimony (Record p. 139, Vol. No. 1).

From this it appears that Dillon did not see Sprinkle's car at all *until he heard the brakes crying,* which means that the *brakes had been applied* and that the *speed of the car had been arrested.* How, then, could Dillon estimate the speed of a car, seated in the cab of his truck, with his back turned to the approaching car, *which he never saw until after the brakes had been applied?*

GORDON COLEMAN, Traffic Officer, plaintiff's witness (Record p. 24, Vol. No. 1).

The plaintiff did introduce a witness whose testimony is worthy of credence on the subject of the speed of Sprinkle's car. Gordon Coleman is a State Traffic officer. He visited the scene of the accident shortly after its occurrence, in the course of his official duties. He stepped off the length of the skid marks. He said (Record p. 29, Vol. No. 1).

> "Q. How many feet would you estimate it?"
> "A. I think it was over 100 feet."
> "Q. How much over 100 feet?"
> "A. It seems to me it was 110 feet."
> "Q. That was the estimate that you made?"
> "A. Yes, sir."
> "Q. That was the estimate you made at the first trial, Mr. Coleman. Did you not make an estimate as to the speed of the car from those skid marks?"
> "A. I don't recall whether I did or not. You asked me something about how fast I thought the car was going."
> "Q. On page 42 of the record of the first trial I asked you this: 'Q. Would you be able to say from your knowledge whether the car was going fast or slow by reason of those skid marks?' Your answer was: 'A. Well, from the skid marks I would judge it was going around forty miles an hour. He wasn't going fifteen

or twenty miles an hour.' Did you make that statement in the first trial?"

"A. Yes, sir."

Reverting to the testimony of Malcolm, we find that at the rate of 60 miles an hour Sprinkle's car would have covered the 670 feet in a little less than 8 seconds, and that, while the plaintiff at the ordinary gait of three miles per hour could have crossed the road in 4½ seconds. And we find that if plaintiff's witness, Coleman, the traffic officer, is to be believed, Sprinkle's car, traveling at the rate of 40 miles per hour, would require a little less than 11½ seconds to cover the 670 feet.

Mrs. J. L. Candler, for plaintiff (R. 142, Vol. 1).

It is true that Mrs. Candler testifies that Sprinkle's car came up "like a rush of wind". But Mrs. Candler also testified that she was in the kitchen of her residence looking through a small wire screened window, which is shown on a photograph of the Candler residence, filed as an exhibit, and it is likewise admitted that Davis was struck by the right hand side of Sprinkle's car, whereas, Mrs. Candler's view was from the left hand side of Sprinkle's car, thus to an extent putting the car between her and Davis.

It is also true that Mrs. Candler contradicts Davis, that is to say, the testimony of Davis at the third trial, for she states that his position in the road when struck was "about middleway of the last truck, right across in the road" (R. 143, Vol. 1), whereas Davis testified that he went straight across from the rear of the truck to the other side of the road where his lunch bucket was, and that his lunch bucket was opposite a point not more than one foot from the rear of the truck in which he had been riding.

It is worth noting that Mrs. Candler claimed to be an eye witness of this accident. She resided immediately at

the scene of the accident. There were two trials of this case at which she did not appear as a witness, having declined to appear. She might have been summoned, but evidently neither side cared to hazard compulsion of this sort with a witness who declined to testify. It was only at the third trial that Mrs. Candler appeared.

It may be noted, too, that if it be conceded that plaintiff and his other witnesses are telling the truth, and if it be conceded that as has been so insistently contended herein, if under the testimony of the plaintiff and his other witnesses it would have been impossible for Sprinkle to have reached Davis before Davis had crossed the road, it would follow that *no matter how fast Sprinkle was driving*, no matter what speed might be indicated by the perfervid expression—"like a rush of wind"—such testimony would be of no consequence, *because according to Davis and his other witnesses, he would have crossed the road before the car driven, even like a rush of wind, could have reached him.*

The plaintiff proves that he had to walk only ten feet, not twenty, while Sprinkle's car was approaching from a point more than six hundred and seventy feet easterly.

Petitioner respectfully invokes special consideration of the following testimony of plaintiff's witnesses.

(a) Milton (R. 64, Vol. 1):

> "Q. Mr. Milton, these skid marks that you saw on the road, where did they start from?"
>
> "A. They started opposite a little hickory tree that is on the north side of the highway that the bark has been skinned off that I ran over a few days before this accident and got a bawling out about it."
>
> "Q. Those skid marks were right opposite that little hickory tree?"
>
> "A. Yes, sir, mighty close to that little hickory tree."

"Q. Is that the little hickory tree with the handkerchief tied around it shown in plaintiff's exhibit No. 4?"

"A. Yes, sir. I tied that handkerchief on the tree myself."

Again, Milton says:

"Q. Now, where did those skid marks intersect the center line of the road? Do you know that?"

"A. No, I couldn't tell that exactly."

"Q. How far from where they started to the center line? Could you approximate what that distance was from where the skid marks started to the point where they crossed the center line of the highway?"

"A. I could tell approximately. I couldn't say for sure."

"Q. What is your best judgment?"

"A. It would run somewhere around fifty or sixty feet."

"Q. 50 or 60 feet before they crossed the center line?"

"A. Yes, sir."

(b) Adrian Overstreet (R. 14, Vol. 2):

"Adrian Overstreet, recalled.

"Examination by Mr. Hickson:

"Q. Mr. Overstreet, have you scaled the distance from point 'B' to a point on the edge of the highway opposite the 2 inch hickory tree?"

"A. I have not but I will. The hickory tree is 39 feet east of the rear end of the truck, which point is designated as point 'B'."

Akers Confirms.

Akers, foreman and witness for plaintiff (R. 124, Vol. 1):

"Q. Can you tell us how far the car driven by Mr. Sprinkle went after the brakes were applied before the man was struck?"

"A. Well, I put it about half-way the skid marks and the State trooper stepped the skid marks 44 paces, and

he struck him somewhere near half-way the skid marks. I never measured it."

"Q. Around 65 feet?"

"A. Somewhere near that distance."

All of which fits in with Milton's testimony. We have seen that Milton testified that the skid marks ran for approximately 50 to 60 feet in Sprinkle's lane before crossing the center line of the road. We have seen that the skid marks, according to Overstreet, began 39 feet east of the point where Davis entered the highway. We have just seen that Akers testified that the car ran around 65 feet after the brakes were applied, before striking Davis, which is to say that the car ran about 65 feet before striking Davis after the skid marks were made, for it was the application of the brakes which caused the friction which made the skid marks.

Thus, it seems absolutely certain from this testimony of appellee's witnesses *that Sprinkle's car was in its right lane when it passed the point where Davis entered the road.* What we are leading up to is this: That if the car was not in sight at a distance of 670 feet when Davis entered the highway, to cross, and if the car passed in its right lane the point where Davis entered the highway, *then all that Davis had to do to avoid that car was to walk 10 feet across the right lane, and be safe.* Which is *to say, further, that Davis had to walk only 10 feet at an ordinary gait while the car was being driven 670 feet.* Remembering again that the car was not in sight when these four men looked down the road at the time that Davis was entering the highway, it would seem conservative to say that according to the testimony of Davis and his witnesses, that car must have gone at a rate considerably over, but certainly not less than 200 miles per hour in order to strike Davis. And this is another absurdity. And this is yet further evidence that the testimony of Davis and his witnesses cannot be true.

Numerous Contradictions Fatal to Plaintiff's Case.

(a) At First Trial Davis Crossed the Road at a Point 130 Feet East of the Candler Home.

The Candler home is on the south side of the highway by the Candler mail box, from which measurements appear to have been made to the point where Davis is variously alleged to have crossed, is about opposite the Candler entrance, and is on the north side of the highway, from which side Davis entered the road.

We quote first from Adrian Overstreet's testimony; (R. 58, Vol. 1):

> "Q. At that time, Mr. Overstreet, (meaning at a time before the first trial) weren't you measuring the visibility at a point 130 feet east of the Candler mail box?"
>
> "A. Yes, sir, I was measuring from a point 130 feet east instead of 78 feet east."
>
> "Q. Why did you measure that visibility at a point 130 feet east of the Candler mail box? Who gave you those directions?"
>
> "A. The plaintiff in this case."
>
> * * * * * * *
>
> "Q. And you think that accounts for the difference when you made your measurements at the first trial and now because you were measuring from a point 130 feet east of the Candler mail box?"
>
> "A. Yes, sir."

We now quote from Malcolm's testimony (R. 40, Vol. 1):

> "Q. From what point did you make your test?"
>
> "A. Judge, when we got to the grounds, this gentlemen told me that the back end of a truck where the accident occurred was 78 feet east of that mail box, etc."

(b) Overstreet Contradicts Himself.

Overstreet says on direct examination (R. 53, Vol. 1):

> "From a point on the north side of the pavement at point "B" on this map I had an unobstructed view of the road for 535 feet, etc."

Overstreet says on cross examination (R. 57, Vol. 1):

> "Q. You could see his shoulders and arms at 670 feet?" (meaning the arms and shoulders of Malcolm.)
> "A. Yes, sir."

(c) Davis, the Plaintiff, Contradicts Himself as to How He Crossed the Highway.

At the third trial Davis admitted having testified at the first trial to a diagonal crossing of the highway (R. 168, Vol. 1):

> "I walked kind of on an angle across the road. My bucket was kind of up about the cab part, and I had to come around the back end and go at a kind of an angle to get it."

But at the third trial Davis says he crossed the highway practically at right angles, R. 158, Vol. 1:

> "Q. Were you walking up the road or in the road any, or were you walking just straight across to the dinner bucket?"
> "A. I was going straight on across over there to the dinner bucket."
>
> * * * * * * *
>
> "It (the dinner bucket) was pretty near level with the back end of the truck. It might have been up just about a foot, or something another, from the back end of the truck—might have been less."

(d) Akers Admits Having Testified at the First Trial That When He First Saw Sprinkle's Car, it Was 350 Feet Away, R. 106, Vol. 1:

"Q. You understood the question. Did you make that statement at the first trial that when this car was 350 feet away Mose Davis at that time had already gotten to the center of the road?"

"A. I suppose I did make it."

And Akers further admits having testified at the second trial that when he first saw Sprinkle's car, it was right on top of Mose Davis, R. 106, Vol. 1:

"Q. At the second trial, page 116: "Q. Where was the car when you first saw it? A. The car was approaching Mose Davis. It was right on Mose Davis coming right on. Q. When you first saw the car it was right on top of Mose Davis? A. Yes, sir. Q. You are positive of that, are you? A. Yes, sir, I first saw the car and Davis about the same time." Now, which of your statements is correct, Mr. Akers?"

"A. Mr. Trader, I might have said that, etc. * * *"

But at the third trial Akers reverts to his original testimony, R. 105, Vol. 1:

"Q. When did you first see the car?"
"A. At the curve at Hawkins."
"Q. How far was that away?"
"A. Approximately 350 feet."

(e) Akers and Overstreet in Conflict.

The Overstreet here referred to is J. W. Overstreet, not Adrian Overstreet, the surveyor. J. W. Overstreet was the driver of the truck in which the plaintiff, Davis, rode. Akers was sitting beside Overstreet in the cab of his truck.

Akers testifies at the third trial (R. 98, Vol. 1):

"When I heard the screeking of the brakes I was going up to the front end of the truck. When I first

heard the car roaring I run to the front end of the truck and hollered 'Watch this car.' "

But Overstreet, also plaintiff's witness, and seated beside Akers, says (R. 130, Vol. 1):

"Q. Did you see Mr. Akers standing out there?"

"A. No, sir."

"Q. Did you see Mr. Akers at all before the accident happened?"

"A. Yes, sir. Mr. Akers was in the cab with me, and *when he was getting out the accident took place. He had both feet on the ground and one hand on the door.*" (Italics supplied)

"Q. He was getting out of the cab when the accident took place?"

"A. Yes, sir."

"Q. And he would have had his back to the north shoulder of the road at that time, would he?"

"A. Yes, sir."

"Q. If Mr. Akers after that ran in front of your cab would you have seen him?"

"A. Yes, sir."

"Q. Did he run in front of your cab before the accident happened?"

"A. No, sir."

Here is a flat contradiction of Akers by Overstreet, both witnesses for the plaintiff. Will this Honorable Court believe Akers, who testified at one trial that he first saw Sprinkle's car when it was about 350 feet away at Hawkins' curve, and then at another trial said that he did not see Sprinkle's car until it was on top of Mose Davis, or will the Court believe Overstreet, the uncontradicted witness?

The Shattered Glass.

There seems to be no dispute that Mose Davis was hit by the right fender and right hand light of Sprinkle's car.

Milton, for plaintiff (R. 64, Vol. 1):

"Q. Which side of the car?" (meaning which side of the car hit Davis.)

"A. It was the right side of the car, the fender and right headlight."

And again, Milton (R. 62, Vol. 1):

"Q. Approximately whereabouts in the road was Mose Davis with reference to the truck driven by Joe Overstreet at the time he was struck?"

"A. I could't say exactly where he was in relation to the truck at the time he was struck. But from the indications of the stuff falling off from the car, *it was between the back truck and the front one* (italics supplied), that was the dirt and the glass that fell from the automobile."

Joe Overstreet says that the truck driven by him was 19 feet long (R. 127, Vol. 1):

Davis says that he entered the road from the rear of that truck, and went straight across to get his dinner bucket.

But Milton says the shattered glass made by the impact of Sprinkle's car with Davis was found between the back truck and the front truck, that is, approximately 24 feet west of where Davis says he crossed the road, and was hit.

Petitioner respectfully directs the attention of this Honorable Court to the fact that all of the foregoing contradictions in which plaintiff's witnesses have become involved relate to objective matters. Subjective matters that rest purely in slippery memory may become faint with the passing of time. But things that we see we do not so easily forget.

For instance, Davis could readily locate the point at which he crossed the road from the rear of the truck in which he was riding. This point could not be 130 feet from a mailbox at one time and 78 feet from the same mailbox at another time.

And so, Davis could not have crossed the road diagonally according to his evidence at the first trial, which indeed was

the basis of the reversal of the trial court because it failed to instruct that such diagonal crossing was a violation of the Virginia statute hereinbefore cited, and then crossed the road at right angles as he said he did at the last trial. Yet, again, Akers could not have seen and heard Sprinkle's car when it was, as he termed it, "a good 350 or 400 feet away" at the first trial, and at the second trial have seen the same car only when it was practically on top of Davis.

And Akers could not have run out in front of the truck in which Davis had been riding and not run out in front of the truck at the same time and place. Yet Akers says he did and Overstreet, sitting beside Akers, says he didn't.

Finally, if the shattered glass was caused by the impact from the right hand headlight on Sprinkle's car with the body of Davis, and if this glass was found in the road at a point about opposite the space between the two trucks, then Davis did not cross the road at the point that he said he crossed it, or in the manner in which he said he crossed it, at the last trial; because, when Sprinkle's car struck Davis the brakes had been applied, its speed had been arrested. It was soon to come to a complete rest, and the momentum was not sufficiently great to throw particles of glass from 20 to 25 feet ahead. These objective matters furnish a severe test of credibility.

The brother of Davis and a number of other laborers in the truck with the plaintiff, do not testify at any of the three trials.

We quote Edward Carter, witness for plaintiff (R. 136, Vol. 1):

> "Q. Edward, who else was on that truck besides Mose Davis, the truck you were on?"
>
> "A. It was a good gang of us on there. I was on there, my brother and his brother."

"Q. Whose brother?"
"A. Mose's brother."
"Q. What was his name?"
"A. Preston Davis. And a whole lot of other boys were on there too."

Three trials have passed; yet Preston Davis, riding in the truck with his brother, the plaintiff, with every opportunity to have a close-up view of every detail, has never been called as a witness by his brother. And of the "gang" of other laborers who were in that truck, not one has been called as a witness for the plaintiff except the two Carter boys. It is submitted that this is a highly suspicious circumstance.

The Unanswered Question in This Case.

The unanswered question in this case is: Why did Sprinkle apply the brakes 2 feet from the shoulder of the road in his right lane to avoid hitting Davis 2 feet from the shoulder of the road in Sprinkle's left lane?

(a) Sergeant Coleman, witness for plaintiff, (R. 26, Vol. 1):

"Q. Will you describe to the jury where those skid marks began and where they ended?"
"A. They started about 2 feet from the right hand edge of the hard surface going west, and ended up in a driveway leading into a home on the south side of the road going west."

(b) Officer Haden, witness for plaintiff, testifies similarly (R. 33, Vol. 1).

(c) Mose E. Davis, plaintiff (R. 157, Vol. 1):

"By Mr. Hickson:

"Q. You got all the way across except a step or half step to have put you off. Is that your testimony?"
"A. Yes, sir."

Put the car anywhere in Sprinkle's left lane: Is there, we ask again, any rational explanation offered as to this sudden, fevered application of the brakes by Sprinkle, 2 feet from his right shoulder, to avoid hitting Davis, 2 feet from the left, or south, shoulder?

We are aware that the suggestion is made by one or two witnesses, like Akers, who did not see the car until the brakes had been applied, and until the moment of impact, that Sprinkle's car was out of control when he began to skid. Where is there one syllable of factual testimony to support this contention? The day was clear, and the road was clear. Plaintiff's witnesses say the trucks were well off the hard surface, parked on the shoulder. The men were on the shoulder, too; Davis alone was in the road. The road was straight at the point of the impact. There was no approaching car. Then why should Sprinkle have lost control at that particular spot, at that particular moment, just at the right spot and the right moment to make contact with Davis—in a diagonal skid across the road, as if shooting him down? Is there a hint of any suspicious detail, or any adequate explanation? Will appellee be permitted to present his case on pure conjecture, speculation without proof or reason?

Moreover, when Sprinkle's car began to skid, it must have been in a diagonal line not less than 75 feet from where Davis says he was struck. And when the skidding began, the brakes were applied, and the speed had slackened. The car was coming to a stop. It is abundantly proved by plaintiff's witnesses that their attention was attracted by the "crying noise" made by friction when the brakes were applied. Akers heard the noise of the approaching car "a good 350 or 400 feet away."

Will the Court believe that Davis alone did not hear all this? And will the court believe that Davis, one step, or a half step, from the shoulder, could not have sidestepped

this skidding, speed-arrested car? A young man with the agility of youth, with this car bearing down upon him from the other side of the road, making a great noise, as Akers testified, and yet unable to take one step to safety?

In a word, is not the whole explanation too grotesque and fanciful for serious consideration? Is IT NOT EVIDENT THAT THE THING NEVER HAPPENED THIS WAY? Is it not evident that Sprinkle applied his brakes and took this sudden turn to his left because Davis came suddenly into the road in front of him, from an obscured position between the two trucks, in violation of the statute, and that Sprinkle was trying to dodge, and save, the man? This is what defendant's witnesses say. Is there any reason to doubt it?

III.

Specifications of Assigned Errors to be Urged.

The assignment of numerous errors will be found in the record, particularly under the caption "Statement of Points Upon Which Appellant will Rely on Appeal."

The errors thus assigned are believed to be substantial. But all of the errors so assigned, petitioner, upon reflection, believes to be wrapped in the single contention that under his own evidence plaintiff has no case against the defendant below, supplemented by his further contention that plaintiff's evidence not only does not prove his case, but that the testimony of the plaintiff below, and of his chief witnesses, is shown to be false by the contradictions hereinbefore pointed out. Therefore, petitioner feels that the following specifications of errors are sufficient:

(a) The error of the Circuit Court of Appeals in affirming the action of the trial court in overruling defendant's motion to strike plaintiff's evidence and to direct a verdict for defendant, which motion was made at the conclusion of plaintiff's case in chief.

(b) The error of the said Circuit Court of Appeals in affirming the action of the trial court in overruling defendant's motion to strike plaintiff's evidence and to direct a verdict for the plaintiff, again made, pursuant to the local state practice, at the conclusion of all of the testimony of both plaintiff and defendant.

(c) The error of the Circuit Court of Appeals in affirming the action of the Honorable Trial Court in overruling defendant's motion to set aside the verdict of the jury and to enter judgment for the defendant pursuant to Section — of the Code of Virginia.

(d) The error of the said Circuit Court of Appeals in affirming the judgment of the trial court on the ground that the jury's verdict in favor of plaintiff could not be disturbed.

The development of the basic errors thus assigned will be found in Section III, *supra*, and in Section V, *post*.

IV.

Argument.

Petitioner has not overlooked the suggestion in Rule 27 (f) that the argument shall be preceded by a summary.

Whether petitioner's presentation of his case by putting under the eye of this Honorable Court ample quotations from the testimony of the witnesses will aid the court petitioner does not know. But this has been petitioner's intention, and the quotation of the very words of each witness, found in Section 3 of this brief, and under appropriate captions, has in large measure anticipated the argument and has left little to do under this Section (b), other than the citation of the applicable decisions of the Supreme Court of Appeals of Virginia.

The Circuit Court of Appeals erroneously assumes that as law which petitioner, with deference, insists is not law in Virginia.

It seems appropriate to refer to the only opinion ever delivered by the learned court below upon the merits of

this case. As herein pointed out, this case was argued January 6, 1941, and was decided January 6, 1941. It can scarcely be denied that serious questions were raised in the case, and that arguments were presented orally and by briefs which merited deliberate consideration.

Petitioner respectfully states that he feels that the facts presented in the record and the arguments founded thereon, and the principles of law invoked, entitled him to a studied opinion of the Circuit Court of Appeals, in which the evidence should be discussed and the arguments and the citations should be met—and not merely to the following:

115 F. (2d) p. 625.

"Per CURIAM:

> This is the third appeal by the defendant in this case. On the two prior appeals he complained of the refusal of the District Court to direct a verdict in his favor and of divers other rulings. On account of the other rulings the judgment was each time reversed, but on each occasion we held that there was sufficient evidence to go to the jury. The evidence on the third trial leads to the same conclusion and the judgment is therefore Affirmed."

Petitioner further shows that on February 4, 1941, he presented his petition for rehearing, in which he sought to point out what he conceived to be the court's errors (117 F. (2d) p. 938).

It will appear that in its opinion of January 6, 1941, the court below meets squarely the issue which petitioner now presents, with the statement that:

> "On account of the other rulings the judgment was each time reversed, but on each occasion we held that there was sufficient evidence to go to the jury. The evidence on the third trial leads to the same conclusion, and the judgment is therefore Affirmed."

And that in denying the petition for rehearing, the court reaffirms and liberalizes its opinion above quoted when it says in its opinion of February 17, 1941: "It is too well settled to justify discussion that on motion for directed verdict by defendant the evidence must be considered in the light most favorable to plaintiff and that the court will not pass upon the credibility of witnesses."

It may be said that the points upon which the petitioner, then appellant, relied, were not merely the denial of the motion to strike, but a number of other points as well, including the denial of defendant's motion to set aside the verdict of the jury, and to enter final judgment for the defendant, or to grant the defendant a new trial pursuant to Section 6251 of the Code of Virginia.

Petitioner respectfully asks leave to point out, also, that in its opinion, dated June 12, 1939, deciding the first appeal in this case (104 F. (2d) 489), the Circuit Court of Appeals says: "Undoubtedly there is substantial ground for this view of the case (referring to petitioner's case), but we agree with the District Judge that it was a question for the jury to determine under proper instructions."

The Facts on the Third Trial Present an Entirely New Case.

It is important to note that plaintiff's civil engineer witness, C. B. Malcolm, was not a witness at the first or the second trial of this case. Malcolm, the outstanding witness presented by plaintiff for forthrightness and utter candor, appeared for the first time at the third trial.

At the first trial, the distance of visibility was put by Overstreet at 465 feet from the point where Davis entered the road, but Malcolm puts the distance of visibility at 670 feet.

At the first trial Davis crossed the road diagonally, and the Circuit Court of Appeals reversed the trial court because of its failure to instruct the jury that this was con-

trary to the Virginia statute; at the third trial Davis crossed the road practically at right angles.

At the first trial Akers heard Sprinkle's car making a great noise and saw it, too, "a good 350 or 400 feet away." At the second trial Sprinkle's car, when Akers first saw it, was "right on Mose Davis."

At the first trial Akers was out of the truck running out in front of it, warning the men to "Watch this car"; at the third trial J. W. Overstreet, beside whom Akers was sitting in the cab of the truck in which Davis was riding, and a witness for the plaintiff, says that Akers at the time of the accident "was getting out of the truck. He had both feet on the ground and one hand on the door."

And so, without further specifications, the contradictions go, with the result that the third case presented by the plaintiff, if we may be permitted to write with a degree of levity, would not know the first case if it met it in the road.

Yet, with entire deference, it is submitted that the Circuit Court of Appeals in substance treats all three records, all three trials, as one and the same, and, instead of debiting the plaintiff with contradictions which transparently attack the credibility of plaintiff's witnesses, credits the plaintiff on the third trial by the verdicts rendered on the two prior trials, on the second of which trials the learned Circuit Court of Appeals itself reversed the trial court for the sole reason, put in plainer English, but none-the-less truthful, than the Circuit Court of Appeals used, that the atmosphere of the courtroom in which the trial court presided was so permeated with unfair intrusions, unjudicial personal attacks upon counsel, inaccurate statements before the jury at variance with the true facts as found in the record, as to make a fair trial impossible.

Petitioner respectfully joins issue with the Circuit Court of Appeals. Petitioner respectfully submits and does so

on the authority of the decisions of the Supreme Court of Appeals of Virginia that

A Jury's Verdict is Not Sacrosanct.

And if a jury's verdict should ever become sacrosanct, and above the penetrating and discerning eye of an appellate court, it is not too much to say that justice will go out of the windows of our court rooms.

The cases are very numerous in Virginia in which the Supreme Court of Appeals has held that the verdict of a jury which rests upon incredible evidence, which is against the physical facts, which is against facts which the appellate court judicially knows cannot be true, or which is against the plain preponderance of the evidence, will not be allowed.

A broad statement of the rule may be found in the opinion of the court in the relatively recent case (Virginia) of *South Hill Motor Company* v. *Gordon*, 172 Va. p. 193, 200 S. E. bottom p. 644, where the court says:

> "We are aware of the weight which should be given to a jury's verdict, confirmed by a judgment of the trial court. It will be remembered also that we have not hesitated to reverse such judgments when they are not supported by the evidence."

In an older case, the case of *Norfolk & Western Railway Company* v. *Strickler*, 118 Va. 153, 86 S. E. 824, our Supreme Court of Appeals says in words more definitely applicable to the facts of the case at bar:

> "This court has repeatedly declared that courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible. Though the case be heard as upon a demurrer to the evidence, the Court will not stultify itself by allowing a verdict to stand, although there may be evidence tending to support it,

when the physical facts demonstrate such evidence to be untrue, and the verdict to be unjust and unsupported in law and in fact."

Again we quote from the case of *Norfolk & Western Railway Co.* v. *Crowe's Admx.*, 110 Va. 798, 67 S. E. 518. Here the court lays down the rule (110 Va. 805):

> "Now, to accept as true the statement of the witness Rutledge, upon which the verdict of the jury can alone be sanctioned, that he and his companion, the deceased, although they had both at 25 feet from the railroad track and again at the crossing looked and listened for an approaching train, and neither saw nor heard the train coming, although neither the sight nor the noise made by the train was obstructed, would, under the circumstances narrated, be to accept as true that which in the nature of things could not be true.
>
> "In such a case, when the fact testified to and the fact necessary to be proven in order to sustain the verdict of a jury could not in the nature of things be true, the authorities clearly held that the verdict should be regarded as against the evidence, and be set aside."

In this case Judge Cardwell, an able Virginia judge, quotes from Moore on Facts, as follows:

> "Courts are not so deaf to the voice of nature or so blind to the laws of physics that every utterance of a witness in derogation of these laws will be treated as testimony of probative value because of its utterance. A court will treat that as unsaid by a witness which in the very nature of things could not be said."

In the case of *Massie* v. *Firmstone*, 134 Va. 450, 114 S. E. 632, the Virginia Court says:

> "A plaintiff who has no case upon his own evidence has no case at all. * * * He therefore cannot complain because we accept his statements as true."

And from page 462, 134 Va., in this same case, the Virginia court says:

> "No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here, it depends on facts within his own knowledge and as to which he has testified."

To like effect is the case of *Thalhimer Bros.* v. *Casci*, 160 Va., 439, 168 S. E. 433, in which latter Reporter the Virginia court says at page 435:

> "Conflicts in testimony are usually for the jury, but this is not always true. When a plaintiff has testified to facts within his own knowledge upon which his case turns, he must abide by his statements. He cannot rest his recovery upon the evidence of others. He cannot ask a jury to believe that his account of the transaction is not to be relied upon. Massie *v.* Firmstone, 134 Va., 450, 462, 114 S. E. 652; Davis Bakery *v.* Dozier, 139 Va., 628, 640, 124 S. E. 411; Bassett & Co. *v.* Wood, 146 Va., 660, 132 S. E. 700; Maryland Casualty Co. *v.* Cole, 156 Va. 707, 158 S. E. 873."

A more recent case to like effect is the case of *Harris* v. *Howerton*, 169 Va. 659, 194 S. E. 696.

And *Harrell* v. *Virginia Electric & Power Co.*, decided on January 13, 1941 by the Supreme Court of Appeals of Virginia, not yet reported in the Virginia Reports, but reported in 12 S. E. (2d), p. 833, reaffirms *Massie* v. *Firmstone*, *supra*, in toto, and wherein the same principle is applied to another negligence case.

In the light of these principles laid down repeatedly by the Supreme Court of Appeals of Virginia, we revert for a moment only to the facts disclosed by plaintiff's own evidence. Let it be remembered that plaintiff's witnesses prove that Sprinkle's car did not cross his right lane of the highway until it was from 10 to 20 feet west of where Davis

says he crossed this highway. From this fact we have argued that Davis manifestly had to walk only 10 feet, or half the width of the highway, in order to clear the path of Sprinkle's car.

Yet, it is the contention, it must be the contention of the plaintiff below that he could not walk these 10 feet while Sprinkle's car was approaching from a point more than 670 feet easterly, for Davis, and his three witnesses, the Carter brothers and Shelton, say that the car was not in sight when Davis started across, and Malcolm, the surveyor witness, says that there was clear visibility 670 feet easterly.

Let it be remembered, too, that if the contention last mentioned be disregarded, according to Malcolm, Davis could easily have walked entirely across the highway before Sprinkle could have reached him from a point beyond the 670 feet of sight clearance, at any conceivable speed at which Sprinkle might have been driving.

Let it be remembered, also, that if these facts be true, it matters not what any other witness may say, whether it be Mrs. Candler, who, residing immediately at the scene of the accident, positively declined to testify at the first and second trials, but had a strange urge to testify at the third trial, or what Akers may say, Akers, the self-contradicted witness, or what any other witness may say—for the reason that if under the testimony of Davis and his supporting witnesses, Sprinkle's car could not possibly have reached him—that there is the matter.

The Presumption of Law in Virginia From Failure to Call an Available Witness.

In *Altavista Cotton Mills* v. *Lane*, 133 Va. 1, 112 S. E. 637, the Virginia court says, subsection (5) of its opinion, bottom page 649, 112 S. E.:

> "Failure to call an available witness possessing peculiar knowledge concerning facts essential to a

> party's case, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness be favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference sometimes denominated a 'strong presumption of law' that the testimony of such uninterrogated witness would not sustain the contention of the party. 16 Cyc. 1062."

In *Appalachian Power Company* v. *Wilson*, 142 Va. 468, 129 S. E. 277, the Virginia court says, subsection (2) of its opinion, top p. 280, 129 S. E.:

> "Richardson's duties as lineman evidently carried him past the pole after it was placed in the road. He could have explained his lack of knowledge of the location of the pole, if he had no such knowledge, but for some unknown reason the company failed to introduce him as a witness in its behalf. Under such circumstances, the presumption is that his testimony would have been against the interest of the company."

In the case of *Draper* v. *Commonwealth*, 132 Va. 648, 111 S. E. 471, a criminal case, the brother of the prisoner was not produced as a witness. The Supreme Court of Appeals of Virginia said, subsection (4) of its opinion, 111 S. E. 474:

> "If this statement was true, then Clark Draper would have been a material witness for the commonwealth, and, if it was not true, he would have been a material witness for the defendant. Under these circumstances the commonwealth had the right to show that it had attempted to procure Clark Draper as a witness, and, further, to inquire of both the prisoner and his father whether they knew the whereabouts of Clark Draper, and whether they had anything to do with keeping him away from the trial. The fact that

> they did not attempt to produce Clark Draper or account for his absence, when there was evidence before the jury tending to show that he knew material facts in the case, was a matter for fair inference and argument."

The application of the foregoing principles to this case relates, of course, to the failure of Mose Davis, the plaintiff, to introduce his brother, Preston Davis, who was riding in the same truck in which the plaintiff rode and who was necessarily an eye witness of the accident.

And no less do the last cited cases relate to the failure of the plaintiff to introduce as witnesses the other occupants of this truck. Edward Carter, for plaintiff, says, R. 137, Vol. No. 1:

> "It was a good gang of us on there. I was on there, my brother and his brother."

Why was not Preston Davis introduced? Why not some others of "the good gang" on this truck?

Petitioner submits that the failure to produce these witnesses is one of the outstanding suspicious circumstances of a case malodorous with suspicion.

VI.

Petitioner's Evidence in the Court Below.

Petitioner here respectfully directs the attention of this learned Court to the charge of the trial judge to the jury at the third trial. After stating to the jury the contentions of the plaintiff, as herein fully set forth, to the effect that after looking both ways and seeing no car, he started to cross the highway, and was run down by Sprinkle before he could get across (R. 6, Vol. No. 1), the trial judge further charged the jury as follows (R. 6, Vol. No. 1):

> "On the other hand, the defendant Sprinkle contends that he was driving along the highway at a lawful rate

> of speed; that before approaching the scene of the accident he gave warning by blowing his horn; that when he was a very short distance from the two trucks referred to in the evidence, the plaintiff suddenly stepped out from between the two trucks and started to cross the highway a short distance in front of the approaching car; that he had no opportunity to stop the car before reaching the plaintiff, but that he again blew upon the horn of his automobile and applied the brake on his car. He further contends that he turned to the left of the highway because the plaintiff had momentarily stopped near the center of the highway and that he, the defendant, Sprinkle, believed that by turning the car to the left of the highway he could avoid striking him."

The contention of the defendant below, Sprinkle, as stated in the above quotation from the learned trial court's charge, is sustained by the explicit testimony of Sprinkle himself, and of defendant's witnesses, Robert Eustace Scott, Walter E. Arrington, E. W. Smoot, and M. B. Witt.

All of these witnesses, except Witt, say that they saw Davis go out into the road from between the two trucks, in the path of Sprinkle's approaching car; and Witt says he saw Davis, two or three minutes before the accident, standing in the crowd where he, Witt, was standing, behind the front truck, which is the place from which the other witnesses say Davis entered the road, thus directly contradicting Davis.

If the determination of the questions of fact at issue were a mere matter of counting noses, so to speak, it would be futile to present these witnesses for the defendant. If it were a mere matter of conflict between two sets of witnesses, equally credible, it would be likewise futile to ask an appellate court to believe the defendant's witnesses and

to discard the testimony of plaintiff's witnesses, for petitioner does not dispute the principle of law which requires a court to consider the plaintiff's evidence in the light most favorable to the plaintiff, as contended in the *Per Curiam* opinion of the learned Circuit Court of Appeals of February 17, 1941.

But this rule does not apply when the testimony of the plaintiff and his witnesses is incredible, is against the physical facts, is contradicted to such an extent which makes it transparently false, it does not carry the cohesive force of truth.

That this is still the accepted law of Virginia is evidenced by the rather recent case of *Burch* v. *Grace Bldg. Corporation*, 168 Va. 329, 191 S. E. 672, wherein the Virginia court says at p. 677 of the S. E. Report:

> "While broadly speaking, credibility is a question for the jury, the rule is subject to the exception that the courts are not required to believe the incredible * * *"

In a word, petitioner respectfully submits that the credibility of the plaintiff's witnesses has been broken and blasted by the plaintiff's witnesses, that the plaintiff's theory of the case has been exploded by the plaintiff's testimony and that there being no other theory, the theory of the defendant must prevail, namely, THAT DAVIS, THE PLAINTIFF, RAN OUT INTO THE ROAD FROM AN OBSCURED POSITION BETWEEN THE TWO TRUCKS, THAT HE RAN IMMEDIATELY INTO THE PATH OF SPRINKLE'S CAR, THAT SPRINKLE, CONFRONTED WITH THIS EMERGENCY, APPLIED HIS BRAKES AND DIVERTED THE COURSE OF HIS CAR FROM ITS RIGHT LANE TO ITS LEFT LANE, IN A FUTILE EFFORT TO SAVE DAVIS.

AND THAT THE JUDGMENT OF THE LEARNED UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT SHOULD

BE REVERSED AND THAT JUDGMENT SHOULD BE ENTERED IN THIS HONORABLE COURT FOR THE PETITIONER, DEFENDANT BELOW, PURSUANT TO SECTION 6251 OF THE CODE OF VIRGINIA.

Respectfully submitted,

M. F. TRADER,
Lynchburg, Virginia,
S. S. LAMBETH, JR.,
Bedford, Virginia,
Attorneys for Petitioner.

(5211)

(22)

Office - Supreme Court, U. S.
FILED
AUG 23 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE, *Petitioner*

v.

MOSE E. DAVIS, *Respondent*

RESPONDENT'S BRIEF

S. H. WILLIAMS and
PHILIP H. HICKSON,
Lynchburg, Va.

LANDON LOWRY, and
DUVAL RADFORD II,
Bedford, Virginia.
Attorneys for Respondent.

INDEX

Subject Index

PAGE

Statement of the Case 1

Law of the Case 5

Summary of Argument 6

Argument 8

1. (a). Petitioner failed to bear burden to justify further review of case 8

1. (b). No writ to review for discussion of specific facts 8

1. (c). Both lower courts concur—No writ to review evidence 11

1. (d). Doctrine of the Last Clear Chance in Virginia 13

2. (a). Judgment not in conflict with local decisions 17

2. (b). Authorities cited by Petitioner not in point 18

3. Charge against Circuit Court of Appeals unfounded 19

TABLE OF CASES

PAGE

Bennett v. *Spencer*, 167 Va. 268, 189 S. E. 169..... 17

Crawford v. *Hite*, 176 Va. 69, 10 S. E. 2d 561..... 13

Fruit Growers Express Co. v. *Hulfish*, 173 Va. 27, 3 S. E. 2d 160..... 18

Gaines v. *Campbell*, 159 Va. 504, 166 S. E. 704..... 11

Gregory v. *Daniel*, 173 Va. 442, 4 S. E. 2d 786..... 17

Johnson v. *Commonwealth*, 142 Va. 639, 128 S. E. 456. 18

Keeler v. *Baumgardner*, 161 Va. 507, 171 S. E. 592... 15

Norfolk So. R. Co. v. *Crocker*, 117 Va. 327, 84 S. E. 681 14

Page v. *Arkansas Nat. Gas Corp.*, 286 U. S. 269, 76 L. ed. 1096, 52 S. Ct. 507..... 12

Parker v. *Norfolk Orange Crush Co.*, 175 Va. 249, 8 S. E. 2d 301..... 17

Perkinson v. *Persons*, 164 Va. 172, 178 S. E. 682..... 16

Texas & N. O. R. Co. v. *Brotherhood Ry. & Steamship Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427 12

U. S. of America v. *Johnson*, 268 U. S. 220, 69 L. ed. 925. 11

Va. Elec. & Power Co. v. *Whitehurst*, 175 Va. 339, 8 S. E. 2d 296..... 17

Va. Elec. & Power Co. v. *Wright*, supra..... 8, 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE, *Petitioner*

v.

MOSE E. DAVIS, *Respondent*

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The Petition for Certiorari rests upon the single assertion that the evidence offered by the plaintiff in the trial court, respondent here, failed to make out a case against the defendant, petitioner here. (Petition for Certiorari, p. 7, Sec. III). It is contended there are certain contradictions in the testimony of witnesses for plaintiff and thereby this evidence is shown to be false and the judgment is without credible evidence to support it.

The body of the Brief in support of the Petition is given over to a few narrow quotations from part of the testimony of part of the witnesses and a factual or jury argument that such evidence is incredible and insufficient to support the judgment. The argument raises only the tendencies to be drawn from certain testimony and no effort is made to con-

sider whether or not the evidence as a whole was sufficient to carry the case to the jury.

Hoping to clarify the issue this statement of the case is made.

This case has been tried by juries three times in the District Court and each trial resulted in substantial verdict and judgment for the plaintiff. The amount of the judgment is not and has never been made an issue on appeal.

The case has been reviewed three times by the Circuit Court of Appeals (Fourth Circuit).

At the first appeal of the case to the Circuit Court of Appeals the identical question presented here was before that court and was fully argued. The written opinion carefully considered this assignment of error and concluded that the question presented was for the jury. (*Sprinkle* v. *Davis*, 104 F. 2d 487).

At the second review of the case by the Circuit Court of Appeals the question here presented was again argued but that time an additional principle of the law of negligence was asserted in support of this assigned error. Again the Circuit Court of Appeals carefully considered the question in the written opinion and held it to be for the decision of the jury. This second opinion of the appellate court in this case gives an excellent statement of the law of negligence applicable to the case with Virginia citations. (*Sprinkle* v. *Davis*, 111 F. 2d 925).

For other reasons each of the first two judgments in the case were reversed by the Circuit Court of Appeals and the case twice remanded for retrial.

Upon the third trial of the case in the District Court the two decisions of the Circuit Court of Appeals were carefully adhered to and the defendant assigned no error to the trial court's pronouncements of law or manner in which the trial was conducted. Merely refusal of the formal motions for directed verdict and judgment remained for petitioner to assign as error upon his third appeal to the Circuit Court of Appeals. Therefore, for a third time he assigned this same jury question and made his jury argument to the appellate

court. For the third time the Circuit Court of Appeals held the question to be for the jury and the judgment was affirmed. The written opinion stated:

> "This is the third appeal by the defendant in this case. On the two prior appeals he complained of the refusal of the District Court to direct a verdict and of divers other rulings. On account of other rulings the judgment was each time reversed, but on each occasion we held that there was sufficient evidence to go to the jury. The evidence on the third trial leads to the same conclusion and the judgment is, therefore, Affirmed."
> (*Sprinkle* v. *Davis,* Record p. 38, Vol. 2).

Thereafter petitioner presented his Petition for rehearing and the same was denied. (*Sprinkle* v. *Davis,* 117 F. 2d 938).

The sufficiency of the evidence to support the judgment being questioned respondent wishes to point out certain established facts necessary to an understanding of the case. These facts are, in the main, omitted from petitioner's Statement. Under the circumstances leave is asked to refer to the evidence more freely than would otherwise be done.

Proceeding to the place of the accident as petitioner drove, the highway ascends a vertical curve to the left for approximately 800 feet. In the acute angle of the vertical curve, around which petitioner drove his automobile, is a stone retaining wall and cut bank rising to a height of 7½ feet with a large oak tree growing in the angle of the curve. (R. 4-5, Vol. 2).

From the place respondent started across the highway there was a maximum sight clearance, over part of the cut bank, of the head and shoulders of a man and the top of a car for 670 feet beyond which the view of either is entirely obstructed. The fair, unobstructed view offered each party of the other so as to realize the situation was estimated to be 535 feet. (R. 53-54, Vol. 1).

Respondent was employed as a laborer with a force of men working on the highway and who, at the time of the accident, were engaged in collecting tools at the end of the day's work.

Two trucks used by the highway force were parked on the shoulder of the highway to the right of and off the paved surface in the direction petitioner drove. (R. 126, Vol. 1). Respondent walked around the rear of the truck nearest petitioner's approach and stopped on the shoulder of the road to look for traffic before proceeding to cross the highway to get his lunch bucket. While standing there a fellow worker asked that respondent bring his lunch bucket also, to which respondent consented. Then respondent looked toward Lynchburg in the direction from which petitioner later approached and saw no traffic approaching for the safe distance offered to his view. He then looked along the highway in the opposite direction and saw no traffic approaching from that direction. After taking these views of the highway respondent proceeded to walk across the highway at a diagonal course. When he had crossed to the left side or half of the road as petitioner drove, and within a step or less from the south shoulder of the highway, his attention was attracted by the noise of automobile tires skidding on the highway, he glanced to his left and that instant was struck by the automobile driven by petitioner. (R. 157, 134, 96, 60-61, Vol. 1).

Petitioner was driving the automobile at an extremely high rate of speed and skidded a considerable distance upgrade before striking respondent. (R. 22, Vol. 2). The collision knocked respondent higher in the air than the top of the automobile and in a westerly direction a distance estimated at from 40 to 60 feet. (R. 61, 71-72, 135, Vol. 1). The machine finally came to a stop off the left side of the highway as it was proceeding. (R. 97, Vol. 1). Respondent weighed 170 pounds and the impact was against his left leg, inflicting such injuries as resulted in the amputation of the limb. (R. 160, Vol. 1).

There were two straight, unbroken, parallel marks made upon the highway by the skidding or dragging of the wheels of petitioner's automobile which measured a distance of 44 paces, approximated to be 132 feet. (R. 33, 62, Vol. 1). The skid marks began close to the right side or edge of the pavement as petitioner was driving and extended in a straight

diagonal course across the highway and off the left side thereof. (R. 33, 25-26, Vol. 1). The pavement was dry and visibility clear. (R. 23, Vol. 2).

Petitioner had seen the force of men at work along the highway at the place of the accident earlier in the day as he drove to Lynchburg. (R. 33, Vol. 2). Approaching the scene of the accident petitioner testified he saw the tops of the cabs of the trucks as he rounded the stone retaining wall in the curve (a distance of 670 feet) (R. 24, Vol. 2) and saw the men in and about the trucks when he was 300 or more feet from the trucks. (R. 24, Vol. 2). After seeing the trucks and the men along the side of the highway, petitioner testified he did not reduce the speed of his car but accelerated the speed of the machine. (R. 25, Vol. 2). No warning horn was sounded by petitioner.

The evidence is that petitioner was driving at such an excessively high rate of speed as he rounded the curve and approached the scene of the accident, his automobile was out of control and appeared it would go off the road and crash into the trucks parked to the right side thereof (R. 143, Vol. 1). To avert this collision, petitioner turned his machine to the left and it skidded out of control diagonally straight across the road and struck respondent who was then on the south or left side of the road. The right half of the road, as petitioner was traveling, was open and clear for travel. (R. 102, Vol. 1).

Respondent never saw petitioner's approach and had no opportunity to know of his peril and save himself from injury. (R. 157, Vol. 1; R. 29, Vol. 2).

LAW OF THE CASE

This case presents no disputed question of law.

The construction of no statute—Federal or State—is involved in this case. It is not a case of initial application of any principle of law in local federal courts.

The case is of no general interest and of no important State or local interest.

At the trial of the case the Court's charge to the jury embodied every request of the petitioner (defendant below) for instructions of law. Every theory of his defense was fully covered to his satisfaction as is confirmed by his favorable quotation from the trial court's charge to the jury at pages 53 and 54 of his Brief in support of Petition for Certiorari. Nor did petitioner take exception to the court's charge to the jury upon respondent's theory of the case.

As petitioner points out there were conflicts in the evidence. This Petition for Writ of Certiorari assigns as error only the judgment of the Circuit Court of Appeals in affirming the trial court's action overruling petitioner's motions for directed verdict and judgment. The Petition thereby presents the single question of whether or not there was substantial evidence in support of the judgment. Both lower courts decided there was and that all questions upon the evidence were properly for the jury.

The only law to be considered is that governing the weight to be given a jury's verdict confirmed by the judgment of court and whether under the error assigned a different judgment might be rendered in an appellate court.

SUMMARY OF ARGUMENT

Petitioner states three reasons upon which he relies for allowance of writ. The argument will show there is no merit in the reasons advanced for granting the writ:

1. (a). Petitioner has not borne the burden upon him to establish there is no conflict in the evidence of contributory negligence and no direct and reasonable inference to be drawn from the evidence as a whole sustaining the judgment.

Va. Elec. & Power Co. v. *Wright*, 170 Va. 442, 196 S. E. 580.

(b). The judgment is abundantly supported by credible evidence. Certiorari should not be granted to review the evidence for a discussion of specific facts.

U. S. of America v. *Johnson*, 268 U. S. 220, 69 L. ed. 925.

(c). Both courts below having found the facts in favor of respondent, certiorari should not be granted to review the evidence.

Texas & N. O. R. Co. v. *Brotherhood Ry. & Steamship Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427; *Page* v. *Arkansas Nat. Gas Corp.*, 286 U. S. 269, 76 L. ed. 1096, 52 S. Ct. 507; *Gaines* v. *Campbell*, 159 Va. 504, 166 S. E. 704; *Crawford* v. *Hite*, 176 Va. 69, 10 S. E. 2d 561; *Va. Elec. & Power Co.* v. *Wright*, supra.

(d). Under the *doctrine of the last clear chance*, applied in this case, no other judgment could be properly entered even though petitioner's erroneous allegations and conclusions of fact be considered as correct.

Norfolk So. Ry. Co. v. *Crocker*, 117 Va. 327, 84 S. E. 681; *Keeler* v. *Baumgardner*, 161 Va. 507, 171 S. E. 592; *Perkinson* v. *Persons*, 164 Va. 172, 178 S. E. 682; *Parker* v. *Norfolk Orange Crush Co.*, 175 Va. 249, 8 S. E. 2d 301; *Bennett* v. *Spencer*, 167 Va. 268, 189 S. E. 169; *Gregory* v. *Daniel*, 173 Va. 442, 4 S. E. 2d 786; *Va. Elec. & Power Co.* v. *Whitehurst*, 175 Va. 339, 8 S. E. 2d 296.

2. (a). Opinions of the Circuit Court of Appeals in this case are misconstrued and no question of local law has been decided in conflict with the decisions of the Supreme Court of Appeals of Virginia.

Johnson v. *Commonwealth*, 142 Va. 639, 128 S. E. 456; *Fruit Growers Express Co.* v. *Hulfish*, 173 Va. 27, 3 S. E. 2d 160.

(b). Petitioner cites authorities not bearing on the question presented.

3. The serious charge against the Circuit Court of Appeals that it has not given deliberate consideration and rendered a studied opinion upon the merits of the

case raised by this assignment of error is absolutely unfounded and refuted by the Record.

ARGUMENT

1. (a). On this appeal all conflicts in the evidence should be resolved in favor of respondent. An appellant asking for a directed verdict and judgment must do more than show a conflict in the evidence.

> "Generally at a trial by jury, the burden rests upon the defendant to show such negligence by a preponderance of the evidence, but here on appeal when the defendant asked us to hold, as a matter of law, that the plaintiff was guilty of contributory negligence, he must do more. He must show that there is no conflict in the evidence of contributory negligence, and that there is no direct and reasonable inference to be drawn from the evidence as a whole sustaining the conclusion that the plaintiff was free of contributory negligence."
>
> *Va. & Elec. Power Co.* v. *Wright*, 170 Va. 442, 448-449, 196 S. E. 580, 582.

The evidence of respondent and his witnesses was that there was no act of negligence on his part which contributed to the injury. He was in a place of reasonable safety on the opposite side of the highway from the line of petitioner's lawful travel at the time he was struck. Petitioner does not consider any of the evidence conflicting with his theory of contributory negligence or the whole of the evidence to see if an inference can be drawn sustaining the jury's verdict that respondent was not guilty of contributory negligence. Petitioner's Brief does not carry the burden upon him and cites no authority in support of his argument on this point.

1. (b). The whole of petitioner's argument is built around the assertion that there is no credible evidence to support the judgment. That there is affirmative evidence in abundance petitioner does not deny. The con-

tention is to the credibility of the evidence. Hoping to reflect upon the body of the evidence, without commenting upon it, a few excerpts from the testimony are taken and given distorted tendencies. The evidence in this case has too often been carefully considered by too many reasonable and fair-minded men to be the subject of such unwarranted criticism. A sufficient answer to the argument is to recount those who have weighed the evidence. Three trial juries heard the evidence and fixed their respective verdicts for the respondent in the sums of $10,000.00, $8,000.00 and $8,500.00. At each of the first two trials in the district court the same judge presided. At the third trial in the district court a different judge presided. After the first review of the case by the circuit court of appeals one of its judges retired and the successor judge served on the court at each of the two successive appeals. Thus, the evidence in this case has been considered by thirty-six jurors, two district judges, and four judges of the circuit court of appeals. All forty-two of these men decided in each instance that the respondent's case was meritorious and proven by the evidence. For the petitioner to assert that the many who considered the evidence accepted the incredulous and that he, with his prejudice and interest, alone correctly construes the evidence is a preposterous assertion and of no appeal. This same preposterous attitude of the petitioner is reflected in his testimony in which he readily admits the grossest kind of negligence and makes other statements totally unsupported by any other witness.

It should be noted that respondent testified before walking onto the paved portion of the highway he looked for the safe distance open to his view in the direction from which petitioner later approached and saw no automobile. After taking that view he looked in the opposite direction and saw no approaching traffic. He then started walking across the pavement in a diagonal course toward his lunch bucket which was in the yard of private

property. Whether the time consumed by respondent in taking a view in the opposite direction from which petitioner approached and before starting across the highway was a reasonable delay after he had looked in the direction of petitioner's approach was a question for the jury. It was also for the jury to determine upon the evidence at what speed and manner the petitioner was driving at the time of the collision. The evidence of excessive speed at which petitioner was driving his car at the time of the accident is worthy of notice for it must have figured largely in the juries' deliberations and is, even considered alone, substantial support for the judgment. Some descriptions of the speed of the machine by the witnesses are that it was being driven as fast as it could go and more recklessly than any car that the experienced foreman of the men had ever seen a car approach or run through a gang of men (R. 98, Vol. 1); that on hearing the skid noise witnesses quickly looked but the collision had already occurred and respondent was seen high off the ground (R. 71, 78, 150, Vol. 1); "It all seemed like it just happened at once" (R. 135, 157, Vol. 1); "all in the twinkling of the eye. It all just happened at once" (R. 64, Vol. 1); "a car came up like a rush of wind" * * * "it just flew right into the men' * * * 'flew into that man." * * * "The car never sounded a horn or anything. It just came right up on them men without a moment's warning." (R. 143, 146, 147, Vol. 1). Petitioner's own witness stated he saw respondent half way across the road when petitioner's car was 200 feet off and yelled a warning (R. 20-21, Vol. 2). The foreman on the job stated that on hearing the high motor speed of the approaching car he looked to see it at approximately 350 feet off and yelled a warning to all the men in the group (R. 95, 97-98, 105, Vol. 1).

It is an inescapable fact that petitioner must have been driving at the most reckless speed to cause men accustomed to working on public highways and passing traffic to shout a warning to their companions instantly upon

seeing an approaching automobile 350 and 200 feet distant. Nor can the physical fact that the machine skidded 132 feet upgrade, on dry asphaltic-macadam pavement, near the middle of which skid distance it struck a 170 pound man knocking him high in the air at 40 to 60 feet distance, be explained except by the fact that the machine was traveling at a terrific rate of speed when the collision occurred. Petitioner's disregard of this and other material evidence leaves his contention hollow.

Writ of Certiorari should not be granted in this case for only a review of the evidence and discussion of specific facts would result.

U. S. of America v. *Johnson*, 268 U. S. 220, 69 L. ed. 925.

1. (c). The Circuit Court of Appeals reviewed the evidence in this case on each of the three appeals and determined it sufficient to support the verdict and judgment. A review of the evidence to determine there was substantial support for the verdict and judgment is all that the petitioner could have expected had this case been before the Virginia Supreme Court of Appeals.

"When we come to consider facts which are the subject of sharp dispute and have ascertained that a jury's verdict and a court's judgment find in the evidence substantial support, our task is at an end. It would be futile to discuss conflicts in detail when at the end we would have to admit that the verdict and judgment are controlling. It is only necessary to know that there is sufficient evidence to support the verdict."

Gaines v. *Campbell*, 159 Va. 504, 515, 166 S. E. 704, 708.

Even had respondent not proven his case by the overwhelming weight of the evidence, but had left the proof of his case

in doubt, the rule would nevertheless have been the same on a review before the Virginia Supreme Court of Appeals.

> "Close and doubtful negligence cases frequently come to this court. If we review a judgment which approves a verdict in one of those cases and there appears to be nothing wrong with the verdict other than that it is doubtful whether it is sustained by the evidence, then it is our duty to affirm the judgment."
>
> *Va. Elec. & Power Co.* v. *Wright*, 170 Va. 442, 447, 196 S. E. 580, 582.

The same rule pertains before this Court.

> "Many and complicated questions of fact are involved and were argued here, but, as they have been found in favor of the respondent by both courts below, we do not review them."
>
> *Page* v. *Arkansas Nat. Gas Corp.*, 286 U. S. 269, 271, 52 S. Ct. 507, 508, 76 L. ed. 1096, 1098.
>
> "Under the well-established rule, this court accepts the findings in which two courts concur, unless clear error is shown." * * *
>
> "The most that can be said in favor of the petitioners on the questions of fact is that the evidence permits conflicting inferences, and this is not enough."
>
> *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & Steamship Clerks*, 281 U. S. 548, 558, 559-560, 50 S. Ct. 427, 429, 430, 74 L. ed. 1034, 1040.

The established rule of this Court to accept the findings of the lower courts is particularly applicable in this case because of the different views which the jury may have taken of the evidence. The jury could have decided that respondent was guilty of no negligence or that any negligence on his part was only a remote cause and that the injuries suffered resulted solely from the proximate negligence of the petitioner. It is also true, as is hereinafter noticed, that even if the jury decided

that respondent was contributorily or concurrently negligent, yet, under the law of the case, the jury might have properly found for respondent. Not knowing what view of the case was taken by the jury we do not know on what part of the evidence the verdict was based. Under these circumstances, it would avail nothing to review the evidence since, in the final analysis, it must be admitted there was substantial evidence on which the verdict could have been found. Quite recently the Virginia Supreme Court of Appeals again commented in its opinion upon a like situation, *Crawford* v. *Hite*, 176 Va. 69, 75-76, 10 S. E. 2d 561, 563:

> "It is argued that in walking on the hard-surfaced portion of the road instead of on the shoulder, Mrs. Cook was guilty of contributory negligence which bars a recovery here. This contention is not sound. Even if it be considered that she was guilty of negligence in walking on the pavement, this does not necessarily preclude recovery because there was ample evidence to support the finding of the jury that the driver of the truck, by the exercise of ordinary care, could or should have seen Mrs. Cook in a position of danger and could have avoided running into her. In such a situation the jury had the right to find that the negligence of the deceased was the remote cause and that of the driver was the sole proximate cause of the collision."

1. (d). Respondent requested that the case be submitted to the jury under the theory that the injuries resulted from no negligence on his part and also upon the doctrine of the *last clear chance*. This was done without objection by petitioner. It is not now contended there was insufficient evidence to warrant submission of the case to the jury under the doctrine of the last clear chance. This principle of law as applied in Virginia is defined by the highest court of the State to be:

> "The rule (*i.e. doctrine of the last clear chance*) in question which has frequently been applied to cases in which the plaintiff's negligence has continued to the very

> moment of the injury, is a qualification of the general rule that contributory negligence bars a recovery, and the principle is that, although the plaintiff has been negligent in exposing himself to peril, and although his negligence may have continued until the accident happened, he may nevertheless recover if the defendant, after knowing of his danger and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so. This principle has been adopted by practically all the courts of last resort, both in England and in this country, and has been repeatedly endorsed by this court." (Italicized insert ours).
>
> *Norfolk So. R. Co.* v. *Crocker,* 117 Va. 327, 331, 84 S. E. 681, 683-684.

Petitioner argues that the evidence of respondent and his witnesses is that immediately he had taken a view for automobiles traveling in the direction of petitioner he started across the road and of necessity he must have seen the machine being driven by petitioner. Under these circumstances petitioner asserts that respondent was contributorily negligent and that his testimony of not seeing the approaching automobile is not credible. The evidence will not support the premise but assuming that respondent took no view for automobiles traveling on the highway or that he was negligent in attempting to cross the highway when the machine driven by petitioner was close on him, yet, neither of these circumstances would necessarily preclude his recovery. If petitioner had the last clear chance and failed to perform the duty upon him to save respondent, then the jury had the right to find for respondent.

The opinion of the Supreme Court of Virginia in a case presenting a similar state of facts points out the way in which the jury may apply the Doctrine of the Last Clear Chance under the evidence.

> "The jury could have reasonably found from the evidence that Mrs. Keeler (*defendant*) was guilty of no actionable negligence or that if she were, then the plaintiff was guilty of either contributory or concurring negligence which, of course, would have barred a recovery. On the other hand, they could just as reasonably have found that Mrs. Keeler was guilty of primary negligence, and that the plaintiff was guilty of no negligence which proximately and efficiently contributed to his injury; or they could have found that while the plaintiff was in a state of negligence in crossing the street diagonally between intersections without exercising proper care for his safety, Mrs. Keeler ought to have seen him in his peril, in the exercise of ordinary care, and avoided striking him with her car either by stopping it or by diverting its course."
>
> *Keeler* v. *Baumgardner*, 161 Va. 507, 513-514, 171 S. E. 592, 594.

In the decision of another closely analogous case the Supreme Court of Virginia made the following comments upon the doctrine of the last clear chance as applied to the evidence:

> "The application of the doctrine of the last clear chance was one theory upon which the plaintiff based his right to recover. The evidence justified the court in submitting an instruction on that doctrine. The testimony discloses that Perkinson (*defendant*) could have seen Mrs. Persons (*plaintiff*) standing in the street when

she was still 150 feet away. The jury had the right to conclude that if he had seen her when he should have seen her he could have avoided running over her by using his brakes which were in good condition, by reducing his speed, which he did not do until it was too late, or by seasonably turning back to his right side of the street after passing Mr. Foster's car. The jury could have reasonably concluded that he had a clear opportunity, in the exercise of ordinary care, to have taken one or all of those precautions, and if he had, Mrs. Persons would have been saved even though she were in a state of negligence in standing in, and crossing the street. Whether Perkinson should have discovered her peril sooner than he did, and whether he had a clear chance to save her in the exercise of ordinary care were matters for the jury and by their verdict these things have been decided adversely to the plaintiff in error. Such a finding has substantial evidence to support it."

Perkinson v. *Persons*, 164 Va. 172, 176-177, 178 S. E. 682, 684.

At the risk of repetition we would quote from the opinion of a third recent Virginia case holding that under the doctrine of the last clear chance the jury may find for the plaintiff even though he was contributorily or concurrently negligent.

"We will assume, for the purpose of the discussion of the question now under consideration, that decedent was in a state of negligence while rolling his bicycle on the right side of the traveled portion of the highway. Still it was the duty of the operator of defendant's truck to keep a lookout and to use ordinary care and caution commensurate with obvious danger to avoid striking and injuring other users of the highway." * * *

"Careful examination of all the evidence convinces us that it was sufficient to carry the case to the jury on the doctrine of the last clear chance. The evidence presents a factual situation where the jury could, with reason, have found, as they evidently did find, that if the driver

of the truck, who did not see decedent at all before the impact, had been keeping a proper lookout he could have seen decedent rolling a lighted bicycle up a steep incline in ample time to have stopped his truck if necessary to avoid inflicting injuries upon him."

Parker v. *Norfolk Orange Crush Co.*, 175 Va. 249, 252, 254-255, 8 S. E. 2d 301, 302-303.

Therefore, if petitioner's contention of contributory negligence be conceded, nevertheless, under this different theory of the case, upon which it was submitted to the jury, the verdict might have been found for respondent. The burden upon petitioner under the error assigned is to show that under no view of the testimony could the jury reasonably find the verdict or the court sustain that verdict by judgment. This burden petitioner has sought to escape.

No other judgment could be found in this case for petitioner admitted facts sufficient to establish that he could have averted the accident by the exercise of any reasonable or even slight degree of care. He admitted that he saw the large force of men and trucks along the side of the highway when at a safe distance of 300 feet or more; that he did not then or at any time before a collision was imminent slow the speed of his machine but, on the contrary, accelerated the speed of his machine; that the right half of the road on which he was required to drive was open to travel, and that he struck respondent on the left side of the road. Under these facts petitioner had the last clear chance to avert the injury to respondent and only a verdict and judgment for respondent could properly be entered.

Other recent cases applying this principle of law are:

Bennett v. *Spencer*, 167 Va. 268, 189 S. E. 169; *Gregory* v. *Daniel*, 173 Va. 442; *Va. Elec. & Power Co.* v. *Whitehurst*, 175 Va. 339, 8 S. E. 2d 296.

2. (a). It is argued that a question of local law has been decided by the Circuit Court of Appeals contrary to the decisions of the highest State court. This argument evolves out

of petitioner's construction of a sentence of the last opinion rendered in this case by the Circuit Court of Appeals. The expression quoted at page 46 of petitioner's Brief, follows:

> "It is too well settled to justify discussion that on motion for directed verdict by defendant the evidence must be considered in the light most favorable to plaintiff and that the court will not pass upon the credibility of witnesses."

This expression he construes as a refusal by the court to review the evidence and search out contradictions which, he states, destroys the credibility of the witnesses and their testimony.

We need not repeat what has been said of the credible nature of the testimony. Actually this complaint is that jury and judge repudiated defendant's testimony and have refused to draw from the plain statements of simple men inferences not in the intendment of their expression. That the jury is the sole judge of the credibility of witnesses and the weight to be given their testimony really requires no support.

Johnson v. *Commonwealth*, 142 Va. 639, 128 S. E. 456; *Fruit Growers Express Co.* v. *Hulfish*, 173 Va. 27, 3 S. E. 2d, 160.

Cases cited by petitioner in support of this "reason" for allowance of writ are beside the point. The argument only contends for a desired conclusion to be drawn from selected excerpts of the evidence.

The Circuit Court of Appeals did not refuse to review the evidence but actually did review it to ascertain there was substantial support for the judgment. This will appear from each of the three opinions in this case (hereinbefore cited).

2. (b). Petitioner argues that the failure of respondent to call his brother as a witness raises a presumption that his testimony would not have supported respondent's case. Furthering this argument, it is alleged that respondent's brother

was necessarily an eye witness of the accident. (Brief, p. 53). There is no support for this assumption in the Record. The Record will disclose that a brother of respondent was employed in the highway force and rode in a truck with respondent to the scene of the accident. Whether or not he saw or was in a position to see the collision is not disclosed. (R. 101, Vol. 1). Important it is that nothing in the Record indicates respondent's brother had any peculiar knowledge or that his testimony would have done more than corroborate the many disinterested and unbiased witnesses who testified on behalf of respondent. The distinction between the authorities cited and the case at bar is all too apparent. This argument was made to the jury at the last trial of the case and at petitioner's request the jury was properly charged upon the law governing the situation.

3. To support this unworthy Petition the shocking assertion is made that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an extension of this Court's power of supervision (Petition for Writ of Certiorari, p. 8, IV. *"The Reasons Relied On for Allowance of the Writ."*) As basis for this charge petitioner complains he has not received the studied opinion of the Circuit Court of Appeals upon the assignment of error before this Court. (*Brief in Support of Petition for Writ of Certiorari, p.* 45). This assertion, like each of the other *reasons* relied on for allowance of the Writ, is absolutely unfounded. The written opinions of the Circuit Court of Appeals best speak for that Court and will show that three times the error relied on here was assigned when the case was before that Court. In each instance the court heard the argument and carefully reviewed the evidence to ascertain that there was substantial support for the juries' verdicts and the judgments of the trial court. Two studied opinions on this feature of the case were written and at the third review of the case petitioner added nothing to his former argument requiring further enlargement of the opinion of the court.

Petitioner has received a fair trial of his case and sympathetic reviews of the case by the Circuit Court of Appeals. The assignment of error is without merit and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

S. H. WILLIAMS and
PHILIP H. HICKSON,
Lynchburg, Virginia.

LANDON LOWRY and
DUVAL RADFORD II,
Bedford, Virginia.
Attorneys for Respondent.

23

FILED
SEP 2 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE, *Petitioner*

vs.

MOSE E. DAVIS, *Respondent*

PETITIONER'S REPLY BRIEF

M. F. TRADER,
Lynchburg, Virginia

S. S. LAMBETH, JR.,
Bedford, Virginia
Counsel for Petitioner

SUBJECT INDEX

PAGE

Every Argument of Respondent Predicated On Palpably False Testimony 1

Respondent Ignores His Own False Evidence and Thereby Admits Its Falsity 2

Respondent's Unsupported Charge that Petitioner Has Suppressed the Facts Answered and Refuted 3

Petitioner Quotes Part of the Witnesses, but the Other Part, Including Plaintiff's Brother, Respondent Would Not Produce 5

Last Clear Chance Doctrine Has No Application Whatever 5

Respondent is Silent as to the Contradictions of His Own Witnesses 6

Respondent Strains at a Gnat and Swallows a Camel 8

Conclusion 9

Supreme Court of the United States

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE, *Petitioner*

vs.

MOSE E. DAVIS, *Respondent*

PETITIONER'S REPLY BRIEF

Petitioner asks leave to make brief reply to Respondent's Brief, with the object of uncovering the fallacies and misconceptions therein.

Petitioner's supporting brief is replete with quotations from the testimony of plaintiff's (Respondent's) witnesses. It will be necessary, therefore, merely to refer to the appropriate pages of petitioner's supporting brief in order to sustain the contentions put forth under the following captions.

I

Respondent Predicates Every Argument Upon Evidence Which is Palpably False

Petitioner's whole case rests upon the postulate that the testimony of Davis and his witnesses is false upon its face; that the contention that Davis could not cross

a 20-foot road without being struck by Sprinkle's car, admittedly not in sight 670 feet away, with no obstruction to vision, when Davis started across, is manifestly an absurd contention; is a mathematically impossible contention; and that, therefore, it is not possible that the story of the accident as related by Davis and his witnesses can be a true story—and that the only other evidence in the case, Petitioner's evidence, namely, that Davis ran suddenly out from between the two trucks immediately into the path of Sprinkle's approaching car, and that Sprinkle suddenly applied his brakes and swerved to his left in an effort to avoid hitting Davis, is the only credible testimony in this case.

See Supporting Brief, pages 16 to 20, inc., and pages 26 to 29, inc.

II

Respondent Ignores His Own Evidence, Which Demonstrates that Davis Had to Walk Only 10 Feet While Sprinkle was Driving Over 670 Feet, in Order to Clear Sprinkle's Car

We refer to pages 32 to 34, inclusive, Petitioner's Supporting Brief.

Here petitioner sets forth in detail plaintiff's evidence, not petitioner's, to the effect that Sprinkle crossed the center line of this 20 foot road 50 to 60 feet west from the beginning of the skid marks; that the skid marks began just opposite a little hickory tree; that the hickory is 39 feet east of the rear edge of the truck, being point B on Respondent's map, and being the point at which Respondent contends Davis entered the road.

In other words, Petitioner demonstrated from plaintiff's evidence, above referred to, that Davis entered the highway from *11 to 20 feet east of the point where the skid marks made by Sprinkle's car crossed the center line of the highway,* and that therefore (as Sprinkle's car was in his right lane of this 20-foot highway when it

passed the point where Davis started across) Davis had to walk only 10 feet, the width of this right lane, *in order to clear the path of a car not in sight 670 feet away when he started across.*

The reply brief of Respondent may be searched from cover to cover without finding any answer to, or even any reference to, these undisputed facts *proved by Respondent's own witnesses.*

Why could not Davis walk 10 feet to safety while Sprinkle's car, according to plaintiff's undisputed evidence, was coming a distance of more than 670 feet?

III

Respondent says (his brief, p. 1):

> *"The body of the brief in support of the petition is given over to a few narrow quotations from part of the testimony of part of the witnesses."*

Petitioner challenges the accuracy of the above quoted statement. When Petitioner quotes the very words of the plaintiff, Davis (Supporting Brief, p. 16), giving every detail as to how he crossed this highway, and what he did immediately before crossing, is this a "narrow quotation"?

Is this a "narrow quotation from part of the testimony" of this witness? If so, why did not Respondent give in his brief the broad quotation? And if petitioner quoted only part of the testimony of the plaintiff, why did not Respondent give the *other part of the plaintiff's testimony?*

And petitioner quotes from the testimony of Edward Carter (Supporting Brief, pages 16 and 17), and from the testimony of Thomas Carter (Id. p. 17) and from the testimony of F. T. Shelton (Id. p. 17), all plaintiff's witnesses, and all eye witnesses of the accident.

If petitioner did not quote accurately, or all, of the pertinent testimony of these witnesses, why did not re-

spondent supplement the "narrow quotations" with broad and full quotations?

Likewise, petitioner quoted the testimony of Respondent's expert witness, an accredited engineer, C. B. Malcolm (Supporting Brief, pages 19, 20, 26, 27 and 28). If any part of the testimony of this frank and favorable witness was suppressed, why did not respondent himself quote such unquoted part?

RESPONDENT'S BRIEF MAY BE SEARCHED FROM THE FIRST PAGE TO THE LAST, AND NOT ONE WORD WILL BE FOUND, NOR ONE SENTENCE OF TESTIMONY PRODUCED, TO CONTRADICT THE WORDS OF THE RESPONDENT'S WITNESSES QUOTED IN PETITIONER'S SUPPORTING BRIEF.

This testimony stands unchallenged, and hence admitted. Petitioner respectfully urges that this Honorable Court, after reading plaintiff's own evidence, quoted in petitioner's Supporting Brief, may ask itself whether the accident could ever have happened if plaintiff and his witnesses have told the truth.

Petitioner, therefore, submits that the already quoted assertion in Respondent's brief (page 1) that "the body of the brief in support of the petition is given over to a few narrow quotations from part of the testimony of part of the witnesses," is an assertion which is at once indicative of excessive and unguarded forensic zeal, is not supported by a single fact found in the record, and can serve only as an example of like inaccuracies of statement which run through respondent's brief, but which, for lack of space, petitioner is unable to notice.

IV

On this same page (1) of Respondent's Brief, Petitioner is charged with having quoted the testimony only of

"Part of the Witnesses"

Petitioner respectfully asks: Where and who are the other part of the witnesses who saw Davis cross the road or who looked easterly just before he crossed? Has Respondent named them in his brief? *Not one.*

Petitioner asks leave to say that while he quoted all of the witnesses produced by plaintiff, there were in fact other witnesses whose testimony was not available to petitioner because *the plaintiff below did not see fit to produce them.*

Edward Carter (Supporting Brief, p. 40), when asked "Who else was on that truck besides Mose Davis, the truck you were on?" replied: "It was a good gang of us on there," including the plaintiff's brother, Preston Davis.

Thus it appears that the "part of the witnesses" not produced were, suspiciously, *the plaintiff's own brother,* and others who were riding in the same truck with the plaintiff, but whom he did not see fit to produce as witnesses (See Supporting Brief, pages 51, 52, and 53).

V

The Last Clear Chance Doctrine Has No Application

Respondent invokes the doctrine of last clear chance (Respondent's Brief, pages 13 to 17, inclusive). This doctrine assumes that Davis was in plain view of Sprinkle, that Sprinkle had the last clear opportunity to see Davis and to avoid the accident, even though Davis was negligent.

But Respondent is here *assuming the verity of the testimony of Davis and his witnesses*—a violent assumption under the facts set forth in the record.

Respondent overlooks petitioner's demonstration that the whole story of Davis is incredible, is an impossible story, is a fabrication which falls to pieces when tested by the mathematical certainties found in the testimony of Respondent's witness, Malcolm, hereinbefore cited.

If this be true, which is to say, if Davis, according to his own evidence, could have walked 10 feet, out of the path of Sprinkle's car, more than 670 feet away, before Sprinkle could have reached him (Davis) or, even could have walked entirely across the 20-foot road before Sprinkle could have reached him, then Davis *did not in fact cross the road from the point where he and his witnesses said he crossed,* but he ran out in front of Sprinkle's approaching car, from an obscured position between two trucks, as Sprinkle says he did.

Therefore, Sprinkle had no chance to see Davis—*and the last clear chance theory vanishes,* leaving the negligence of Davis in violating Section 2154 (126) (d) of the Code of Virginia, which prohibits a pedestrian from stepping into a road from an obscured position, as the proximate cause of the accident.

VI

Respondent Likewise Ignores the Contradictions of Himself and His Witnesses, Which Prove Nothing Short of Mendacity

We have but to refer to pages 35 to 40, inclusive, of petitioner's supporting brief. It is more than significant that not one of these contradictions is denied; indeed, not even referred to, in Respondent's Brief.

Do they not utterly destroy the moral force of Respondent's case? Davis, at the first trial, testified that he crossed the road diagonally, while at the third trial Davis declared that he crossed the road practically at right angles, that his dinner bucket "was pretty near level with the back end of the truck" (Petitioner's Supporting Brief, bot. p. 36).

Akers, a foreman, and perhaps the most zealous witness for Davis, admits at the first trial that he first saw and heard Sprinkle's car when it was 350 feet away from Davis. Akers admits at the second trial that when he

first saw Sprinkle's car, "it was right on top of Mose Davis." But at the third trial, Akers reverts to his testimony at the first trial and says that when he first saw the car "it was approximately 350 feet away" (Supporting Brief, p. 37).

Again, at the third trial, Akers says that when he heard the roaring of Sprinkle's car he ran to the front end of the truck. But Overstreet, also plaintiff's witness, the driver of the truck in which Akers (seated beside Overstreet) was riding, says that Akers did not run to the front of the truck, but that at the time of the accident: "Mr. Akers was in the cab with me, and when he was getting out the accident took place. He had both feet on the ground and one hand on the door." (Supporting Brief, p. 38.)

Petitioner respectfully inquires whether this Honorable Court will pay any heed whatever to the testimony of the plaintiff and of his chief witness, Akers, when each unblushingly reverses his testimony to suit what he conceives to be the exigencies of the particular occasion.

It will be remembered that the learned Circuit Court of Appeals reversed the District Court on the first appeal upon the ground that Davis was walking diagonally across the road (*Sprinkle* v. *Davis*, 104 F. 2d. (487)). Manifestly, Davis altered his testimony from a diagonal crossing to a rectangular crossing because of this reversal.

Why Akers at the first trial saw Sprinkle's car 350 feet away and at the second trial did not see it until it was right on top of Mose Davis, we do not know. But this is his testimony.

Are not both of these witnesses utterly discredited and unworthy of belief?

VII

Respondent Strains at a Gnat and Swallows a Camel

Petitioner notes that Respondent concludes his brief with a somewhat perfervid argumentum ad hominem which begins: "To support this unworthy Petition the shocking assertion is made that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an extension of this court's power of supervision."

Respondent seems not to have thought it necessary to quote the entire language used by petitioner in his Petition for certiorari (Petition, p. 8, IV (c)) where petitioner said:

> "The Circuit Court of Appeals has in effect, *though not in intent* (italics supplied) so far departed from the accepted and usual course of judicial proceedings as to call for an extension of this Court's power of supervision."

Petitioner has sought to present his case directly and sincerely, though always with deference and respect for the probity of the learned court appealed from. But petitioner has preferred to employ honest and direct language, rather than weasel words, with which to make his points.

Petitioner has taken exception to the proceedings (not to the purposes) of the lower courts, both the District Court and the Circuit Court of Appeals. For the exceptions to the proceedings in the District Court it will suffice to refer to the opinion in the case of *Sprinkle* v. *Davis*, 111 Fed. 2d. (925), where it will be found that petitioner's exceptions were sustained and that the District Court was reversed by the Circuit Court of Appeals. For the exceptions taken to the action of the learned Circuit Court of Appeals it is only necessary to refer to petitioner's petition for rehearing, found in the record (pp. 41-57, vol. 2).

Petitioner has believed what he has said and he has said in plain words what he has believed. But what of the position of Respondent, who has thus sought by a half statement of the facts to prejudice petitioner before this Honorable Court?

This same Respondent, petitioner finds it necessary to say, has strained at gnats and has swallowed camels. This same Respondent proclaims petitioner's plea for justice "unworthy" and "shocking." But where in Respondent's Brief is there one word which indicates that the unblushing falsehoods of Respondent and of his most important witnesses are "unworthy," or that Respondent's hurdling of these falsehoods without comment is "shocking"?

Conclusion

Petitioner's case is, like petitioner himself, humble and unpretentious, in comparison with the cases with which this most Honorable Court commonly deals, cases which involve mighty constitutional questions and vast amounts measured in money. But petitioner has been taught to believe, and does believe, that this Honorable Court not only looks high above, but bends low beneath, to find justice, and to do justice to the humble as well as to the great.

Petitioner honestly believes that the learned Circuit Court of Appeals has honestly erred. And he submits his grievances, asking only that the record and the briefs be searched for the truth.

Respectfully,

M. F. Trader,
Lynchburg, Virginia

S. S. Lambeth, Jr.,
Bedford, Virginia
Attorneys for Petitioner.